CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 31 **JULY 16, 1997** **NO. 29**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 97–55)

REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Broker license revocation.

SUMMARY: Notice is hereby given that the Commissioner of Customs, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Parts 111.52 and 111.74 of the Customs Regulations, as amended (19 CFR 111.52 and 111.74), the following Customs broker license is suspended with prejudice effective May 1, 1997, through June 1, 1997.

Port	*Individual*	*License #*
Atlanta, Georgia	Customs Advisory Services	11565

Dated: June 26, 1997.

PHILIP METZGER,
Director,
Trade Compliance.

[Published in the Federal Register, July 3, 1997 (62 FR 36095)]

(T.D. 97-56)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: JULY 1, 1997 THROUGH SEPTEMBER 30, 1997

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.752900
Austria	Schilling	0.081615
Belgium	Franc	0.027778
Brazil	Cruzado	0.928850
Canada	Dollar	0.724480
China, P.R.	Renminbi yuan	0.120181
Denmark	Krone	0.150943
Finland	Markka	0.192715
France	Franc	0.170416
Germany	Deutsche mark	0.574020
Hong Kong	Dollar	0.129096
India	Rupee	0.027910
Iran	Rial	N/A
Ireland	Pound	1.516000
Israel	Shekel	N/A
Italy	Lira	0.000590
Japan	Yen	0.008701
Malaysia	Dollar	0.396275
Mexico	Peso	0.126103
Netherlands	Guilder	0.509970
New Zealand	Dollar	0.678000
Norway	Krone	0.136893
Philippines	Peso	N/A
Portugal	Escudo	0.005679
Singapore	Dollar	0.699937
South Africa, Republic of	Rand	0.220702
Spain	Peseta	0.006791
Sri Lanka	Rupee	0.017103
Sweden	Krona	0.129249
Switzerland	Franc	0.685401
Thailand	Baht (tical)	0.040783
United Kingdom	Pound	1.657400
Venezuela	Bolivar	0.002021

Dated: July 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–57)

FOREIGN CURRENCIES

Daily Rates for Countries Not on Quarterly List for June 1997

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): None.

Greece drachma:	
June 1, 1997	$0.003664
June 2, 1997	.003629
June 3, 1997	.003632
June 4, 1997	.003632
June 5, 1997	.003638
June 6, 1997	.003631
June 7, 1997	.003631
June 8, 1997	.003631
June 9, 1997	.003674
June 10, 1997	.003651
June 11, 1997	.003664
June 12, 1997	.003653
June 13, 1997	.003632
June 14, 1997	.003632
June 15, 1997	.003632
June 16, 1997	.003649
June 17, 1997	.003652
June 18, 1997	.003651
June 19, 1997	.003668
June 20, 1997	.003656
June 21, 1997	.003656
June 22, 1997	.003656
June 23, 1997	.003683
June 24, 1997	.003672
June 25, 1997	.003670
June 26, 1997	.003664
June 27, 1997	.003647
June 28, 1997	.003647
June 29, 1997	.003647
June 30, 1997	.003642
South Korea won:	
June 1, 1997	$0.001119
June 2, 1997	.001119
June 3, 1997	.001119
June 4, 1997	.001119
June 5, 1997	.001120
June 6, 1997	.001120
June 7, 1997	.001120
June 8, 1997	.001120
June 9, 1997	.001119
June 10, 1997	.001119
June 11, 1997	.001120
June 12, 1997	.001121

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for June 1997 (continued):

South Korea won (continued):

June 13, 1997	$0.001124
June 14, 1997	.001124
June 15, 1997	.001124
June 16, 1997	.001122
June 17, 1997	.001124
June 18, 1997	.001124
June 19, 1997	.001123
June 20, 1997	.001124
June 21, 1997	.001124
June 22, 1997	.001124
June 23, 1997	.001124
June 24, 1997	.001124
June 25, 1997	.001124
June 26, 1997	.001124
June 27, 1997	.001124
June 28, 1997	.001124
June 29, 1997	.001124
June 30, 1997	.001124

Taiwan N.T. dollar:

June 1, 1997	$0.035855
June 2, 1997	.035855
June 3, 1997	.035842
June 4, 1997	.035817
June 5, 1997	.035817
June 6, 1997	.035817
June 7, 1997	.035817
June 8, 1997	.035817
June 9, 1997	.035842
June 10, 1997	.035855
June 11, 1997	.035842
June 12, 1997	.035842
June 13, 1997	.035829
June 14, 1997	.035829
June 15, 1997	.035829
June 16, 1997	.035817
June 17, 1997	.035791
June 18, 1997	.035804
June 19, 1997	.035778
June 20, 1997	.035778
June 21, 1997	.035778
June 22, 1997	.035778
June 23, 1997	.035817
June 24, 1997	.035842
June 25, 1997	.035868
June 26, 1997	.035894
June 27, 1997	.035920
June 28, 1997	.035920
June 29, 1997	.035920
June 30, 1997	.035945

Dated: July 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

(T.D. 97–58)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR JUNE 1997

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 97–23 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): None.

Australia dollar:	
June 27, 1997	$0.745500
June 28, 1997	.745500
June 29, 1997	.745500
Finland markka:	
June 13, 1997	$0.191325
June 14, 1997	.191325
June 15, 1997	.191325
Ireland pound:	
June 2, 1997	$1.498500
June 3, 1997	1.484000
June 4, 1997	1.487000
June 5, 1997	1.481200
June 6, 1997	1.485500
June 7, 1997	1.485500
June 8, 1997	1.485500
Japan yen:	
June 1, 1997	$0.008591
June 3, 1997	.008610
June 4, 1997	.008598
June 5, 1997	.008645
June 6, 1997	.008666
June 7, 1997	.008666
June 8, 1997	.008666
June 9, 1997	.008879
June 10, 1997	.008881
June 11, 1997	.008975
June 12, 1997	.008773
June 13, 1997	.008705
June 14, 1997	.008705
June 15, 1997	.008705
June 16, 1997	.008811
June 17, 1997	.008822
June 18, 1997	.008811
June 19, 1997	.008765
June 20, 1997	.008724
June 21, 1997	.008724
June 22, 1997	.008724

FOREIGN CURRENCIES—Variances from quarterly rates for June 1997 (continued):

Japan yen (continued):

June 23, 1997	$0.008673
June 24, 1997	.008711
June 25, 1997	.008776
June 26, 1997	.008832
June 27, 1997	.008721
June 28, 1997	.008721
June 29, 1997	.008721
June 30, 1997	.008725

Norway krone:

June 1, 1997	$0.140548
June 2, 1997	.139528
June 3, 1997	.140184
June 4, 1997	.139811
June 5, 1997	.139548
June 6, 1997	.139119
June 7, 1997	.139119
June 8, 1997	.139119
June 9, 1997	.140667
June 10, 1997	.139704
June 11, 1997	.139567
June 12, 1997	.138841
June 13, 1997	.137529
June 14, 1997	.137529
June 15, 1997	.137529
June 16, 1997	.136649
June 17, 1997	.137874
June 18, 1997	.137788
June 19, 1997	.137979
June 20, 1997	.137665
June 21, 1997	.137665
June 22, 1997	.137665
June 23, 1997	.137998
June 24, 1997	.137845
June 25, 1997	.137779
June 26, 1997	.137741
June 27, 1997	.136930
June 28, 1997	.136930
June 29, 1997	.136930
June 30, 1997	.136457

Thailand baht (tical):

June 5, 1997	$0.041667
June 6, 1997	.041754
June 7, 1997	.041754
June 8, 1997	.041754
June 9, 1997	.040984
June 10, 1997	.041494
June 11, 1997	.041754
June 12, 1997	.041580
June 16, 1997	.041667
June 17, 1997	.043956
June 18, 1997	.042017
June 20, 1997	.041152

FOREIGN CURRENCIES—Variances from quarterly rates for June 1997 (continued):

Thailand baht (tical):

June 21, 1997	$0.041152
June 22, 1997	.041152
June 27, 1997	.041152
June 28, 1997	.041152
June 29, 1997	.041152

Dated: July 1, 1997.

FRANK CANTONE,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, July 1, 1997.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

NOTICE OF AVAILABILITY OF 1996 UPDATE TO THE "CUSTOMS VALUATION ENCYCLOPEDIA"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Availability of 1996 Update to the "Customs Valuation Encyclopedia".

FOR FURTHER INFORMATION CONTACT: Elena Kennedy, Value Branch, Office of Regulations and Rulings, (202) 482–7010

DATED: June 24, 1997

SUPPLEMENTARY INFORMATION:

The purpose of this notice is to advise the public that the Customs Valuation Encyclopedia, 1980–1996, is now available. This publication updates the prior Customs Valuation Encyclopedia, 1980–1995. The publication includes a set of instructions which will guide you in removing current pages and inserting new pages of the encyclopedia to complete the updated version.

Copies of this publication may be obtained by contacting the Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA., 15250–7954, or by calling (202) 512–1800. The fee for the publication is $17.00, and checks should be made payable to the Superintendent of Documents.

The stock number for the publication is #048–000–00507–1. You may fax your request for the publication to (202) 512–2250. Please include the stock number in your request (payment by Visa, MasterCard and Discovery is accepted). All subscribers of the U.S. Customs Rulings Diskette Subscription Service will receive a copy on diskette as part of their subscription fee. The update will also be available on the Customs Electronic Bulletin Board. For further information regarding the Customs Electronic Bulletin Board, you may call (703) 440–6236. In addition, if you have access to the Internet, the publication is also posted on the World Wide Web. (http://www.customs.ustreas.gov)

STUART SEIDEL,
Assistant Commissioner.

MODIFICATION OF CUSTOMS RULING LETTERS RELATING TO TARIFF CLASSIFICATION OF OFF-THE-ROAD TIRES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letters.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs in modifying a ruling pertaining to the tariff classification of certain off-the-road tires. Notice of the proposed modification was published May 28, 1997, in the CUSTOMS BULLETIN, Volume 31, Number 22.

EFFECTIVE DATE: This decision is effective for merchandise entered or withdrawn from warehouse, for consumption on or after September 15, 1997.

FOR FURTHER INFORMATION CONTACT: Arnold L. Sarasky, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On May 28, 1997, Customs published a notice in the CUSTOMS BULLETIN, Volume 31, Number 22, proposing to modify New York Ruling Letter (NYRL) 808226, issued March 26, 1995, by the Area Director of Customs, New York Seaport, which held that 5 different off-the-road tires were classifiable under subheading 4011.91.5000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as new pneumatic tires, of rubber; other; having a "herring-bone" or similar tread; other. No comments were received concerning the matter.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103–182, 107 Stat. 2057), this notice advises interest parties that Customs is modifying NYRL 807226 to reflect the proper classification of 2 of those tires in subheading 4011.20.1025 or 4011.20.1035, HTSUSA, if of radial construction, or in subheading 4011.20.5030 or 4011.20.5050, HTSUSA, if of another construction. One of the tires in NYRL 807226 in subheading 4011.99.4000, HTSUSA, if of radial construction, or 4011.99.8000, HTSUSA, if of another construction. Headquarters Ruling Letter 960366 modifying NYRL 807226 is set forth in an attachment to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: June 30, 1997

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, June 30, 1997.

CLA–2 RR:TC:FC 960366 ALS
Category: Classification
Tariff No. 4011.20.1025, 4011.20.1035,
4011.20.5030, 4011.20.5050,
4011.99.4000, and 4011.99.8000

MR. CHRIS LEACH
MITSUBISHI INTERNATIONAL CORPORATION
333 South Hope Street, Suite 2500
Los Angeles, CA 90071

Re: New York Ruling Letter (NYRL) 807226, dated March 28, 1995, regarding certain off-the-road tires from Japan.

DEAR MR. LEACH:

In NYRL 807226 you were advised that 5 different off-the-road tires from Japan were classifiable in 4011.91.5000, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as new pneumatic tires, of rubber; other; having a "herring-bone" or similar tread; other. We have reviewed that ruling and concluded that such ruling no longer reflects Customs thinking with regard to 3 tread patterns. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act. Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), we propose to modify that ruling.

Facts:

The articles under consideration are certain earthmover, loader and dozer and grader off-the-road tires from Japan.

Issue:

Do the subject tires have a herring-bone or similar tread?

Law and Analysis:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI'S) taken in order. GRI 1 provides that the classification is determined first in accordance with the terms of the headings and any relative section and chapter notes. If GRI 1 fails to classify the goods and if the headings and legal notes do not otherwise require, the remaining GRI's are applied, taken in order.

NYRL 807226, dated March 28, 1995 held that 5 tire tread patterns were of ""herring-bone" of similar design. It also noted that its tires are classified in accordance with the Tire and Rim Association (TRA) coding system. Tires with a TRA code beginning with the letter "E" are tires for earthmover equipment which includes large dump trucks. Tires with a TRA "L" code are for loaders and dozers, "G" tires are for graders and "R" tires are for industrial purposes such as forklift use.

Prior to considering whether these tires might have "herring-bone" or similar tread, we note that such a determination is only necessary for tires falling under the "Other" provision of subheading 4011.91, Harmonized Tariff Schedule of the United States Annotated, (HTSUSA), New pneumatic tires for various types of vehicles, e.g., cars, trucks, buses, come under subheadings appearing earlier under the same heading and would be classified thereunder.

In that regard, we note that the application chart of off-the-road tires appearing in the importer's catalog indicates that certain earthmover tires with a TRA code E–1, E–3,–7 are suitable for dump trucks. Accordingly, they would be classifiable in subheading 4011.11.20.10 or 4011.20.50, HTSUSA, depending on whether they were of radial construction or other type of construction. This would cover tires with the tread patterns covered by NYRL 807226: E–3/G–44 and E–4/G–36ET.

We discussed the meaning of the term "herring-bone" with the importer and various industry representatives. We determined that such term is not a current term in the U.S. industry, although one industry representative remembered the term being used in a colloquial manner in the distant past. It was used to refer to a tread pattern consisting of rows of short slanted parallel lines going in the opposite directions from the center of the tread with the slant alternating row by row. These short slanted rows would meet in the center of the tire tread to form a "V." This is in line with various dictiona,y definitions of the term herring-bone, including those referenced by the importer. We also consulted the Explanatory Notes (EN) to the Harmonized System, specifically 40.11 thereof, which represents the view of the international classification experts. All the tire treads pictured therein, except for one, have rows of short slanted parallel lines going in opposite directions with the slant alternating row by row, which meet in the center of the tire and form a "V". One of the tire treads pictured therein has short slanted parallel line with the slant alternating row by row and these rows meet in the center of the tire tread, they form what would appear to be a very shallow "V" which might be better described as a "U". Based on our analysis of this information, we have concluded that a true "herring-bone" tread has alternating rows of tread going in opposite directions, on the diagonal, toward the center of the tire with the tread forming a "V" shape design in the center thereof. We have further concluded the term "similar tread" appearing in heading 4011.91, Harmonized Tariff Schedule, is descriptive of a tire tread having the above-noted slanting alternating tire tread which forms a shallow "V" in the center of the tire tread.

Based on the above we have further analyzed the tread patterns of the off-the-road tires covered by NYRL 807226. We concluded that 3 of the tread patterns, including tires which were previously noted should be classified as truck tires, were not "herring-bone" of similar tread. We note that tread patterns E–4/G–36ET and G–3/G–18, form a zig-zag patterns and have neither short slanting lines going in the opposite directions from the center of the tread nor do they have a tread pattern which form a "V" at the center of the tread. Likewise, pattern E–3/G–44, is merely a series of lugs flowing across the entire tread surface of the tires and slanting in one direction. Accordingly, we have concluded that the tires with the noted tread patterns are not classifiable in 4011.91.5000, HTSUSA, whether or not they are classifiable in an earlier subheading under heading 4011, HTSUSA.

Holding:

NYRL 807226, dated March 28, 1995, is hereby modified with regard to tire tread patterns E–3/G–44, E–4/G–36ET and G–3/G–18. The first 2 of these tire tread patterns are suitable for use on dump trucks and are classifiable in subheading 4011.20.1025 or 4011.20.1035, HTSUSA, if of radial construction, or in subheading 4011.20.5030 or 4011.20.5050, HTSUSA, if of another construction. Tires so classifiable are subject to general rate of 4 percent ad valorem if of radial construction and 3.6 percent ad valorem is of other construction. Tires with the tread pattern G–3/G–18, a zig-zag pattern, which are designed for use on graders, are classifiable in subheading 4011.99.4000 or 4011.99.8000, HTSUSA, depending on whether of radial or other construction. Such tires are subject to a general rate of duty of 4 percent or 3.6 percent ad valorem, respectively,

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

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Thomas J. Aquilino, Jr.
R. Kenton Musgrave
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Donald C. Pogue
Evan J. Wallach

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Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 97–78)

INTERNATIONAL BUSINESS MACHINES CORP., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 94–04–00215

[Plaintiff's motion for summary judgment is denied. Defendant's cross-motion for summary judgment is granted. Judgment entered for defendant.]

(Dated June 18, 1997)

Baker & McKenzie (William D. Outman, II), for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(John J. Mahon)*; Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Mark G. Nackman)*, of counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* This matter is before the Court on the parties' cross-motions for summary judgment. Plaintiff, International Business Machines Corporation ("IBM"), challenges the classification by the United States Customs Service ("Customs") of imported Device Function Controllers ("Controllers") and Direct Access Storage Drives ("Drives") as "office machines not specially provided for," under Item 676.30 of the Tariff Schedules of the United States ("TSUS"), with a duty rate of 3.7% *ad valorem*.

IBM claims that Customs had an established and uniform practice of classifying the subject goods as "parts of automatic data-processing machines and units thereof, other than parts incorporating a cathode ray tube," under Item 676.54, TSUS, and was therefore required to provide notice before it reclassified them under 676.30, TSUS. *See* 19 U.S.C. § 1315(d) (1988). In the alternative, IBM argues that the goods cannot be classified under 676.30, TSUS, and that they should therefore be allowed to enter duty-free under Item 676.54, TSUS.

The Court finds that Customs was not required to provide notice to IBM before it reclassified the subject Controllers and Drives because

there was no established and uniform practice. The Court further finds that, through the application of General Rule of Interpretation 10(h), Customs correctly classified the subject Controllers and Drives as unfinished "office machines not specially provided for" under 676.30, TSUS.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988).

BACKGROUND

The subject merchandise consists of Device Function Controllers, model nos. 7777–A01, 9335–A01, 9335–A02, and Direct Access Storage Drives, model nos. 7777–B01 and 9335–B01, that entered the United States between July 1, 1986 and December 28, 1988. Pl.'s Stmt. of Facts No. 2 at 1, No. 18 at 4; Def.'s Resp. to Pl.'s Stmt. of Facts No. 2 at 1, No. 18 at 3. Both the Controllers and the Drives are designed for, and are used in, an IBM model 9335 Direct Access Storage System ("DASS"). The DASS provides fixed-disk storage for an automatic data-processing system, IBM model 9370, IBM A/S 400. Pl.'s Stmt. of Facts No. 7 at 2; Def.'s Resp. to Pl.'s Stmt. of Facts No. 7 at 1–2. The DASS consists of one Controller and from one to four Drives, housed in an IBM model 9309 Rack Enclosure. *Id.*

Both parties agree that the subject Controllers and Drives are designed to be ultimately mounted in a rack enclosure, and that they are imported without this rack. Pl.'s Stmt. of Facts Nos. 8–10 at 2; Def.'s Resp. to Pl.'s Stmt. of Facts Nos. 8–10 at 2. The parties also agree that, in the condition in which they are imported, the Controllers and Drives contain all of their main components, lacking only cable carriers, slide assemblies required for the rack-mounting, and a base for fixing or placing them on a table, desk, wall, floor, or similar place. Pl.'s Stmt. of Facts No. 5 at 2, No. 16 at 4; Def.'s Resp. to Pl.'s Stmt. of Facts No. 5 at 1, No. 16 at 2.

From approximately April, 1985 until December, 1986, Customs liquidated the Controllers and Drives imported by IBM at the Port of Minneapolis, Minnesota as "parts of automatic data-processing machines," duty-free under Item 676.54, TSUS. Pl.'s Stmt. of Facts No. 12 at 3; Def.'s Resp. to Pl.'s Stmt. of Facts No. 12 at 2. Thereafter, however, Customs liquidated entries of the subject Controllers and Drives as "office machines," at a duty rate of 3.7% *ad valorum* under Item 676.30, TSUS. Pl.'s Stmt. of Facts No. 14 at 3; Def.'s Resp. to Pl.'s Stmt. of Facts No. 14 at 2. Opposing this change in classification, plaintiff filed forty-eight protests with Customs. Customs denied their protests, and plaintiff subsequently filed this action to contest these denials. Pl.'s Stmt. of Facts No. 18 at 4; Def.'s Resp. to Pl.'s Stmt. of Facts No. 18 at 3.

STANDARD OF REVIEW

When faced with a motion for summary judgment, the Court first determines whether the case presents any genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). If the Court finds that the case lacks genuine issues of material fact, and that the

moving party is entitled to judgment as a matter of law, then the Court may grant summary judgment. USCIT R. 56(d).

The two issues that IBM raises do not challenge the factual basis underlying Customs' actions, but instead challenge how Customs interpreted 19 U.S.C. § 1315(d) and the relevant headings and General Rules of Interpretation of the TSUS. These issues, therefore, do not present any genuine issues of material fact, and the Court may grant summary judgment. USCIT R. 56(d). *See also Thomas Equip. Ltd. v. United States* 881 F.Supp. 611 (CIT 1995) (granting summary judgment in an established and uniform practice case); and *IKO Indus. Ltd. v. United States*, ____ Fed. Cir. (T) ____, 105 F.3d 624 (1997) (granting summary judgment when the sole issue is whether Customs properly interpreted tariff schedule).

To decide the present cross-motions for summary judgment, the Court first considers whether the classification applied by Customs accurately describes the subject Controllers and Drives. *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). The Court then considers whether the classification proposed by IBM better describes the Controllers and Drives. *Id.*

The Court notes that Customs' chosen classification is not entitled to a presumption of correctness because the issues are legal, not factual. *Universal Elect. Inc. v. United States*, ____ Fed. Cir. (T) ____, ____, 112 F.3d 488, 493 (1997); *Goodman Mfg. L.P. v. United States*, ____ Fed. Cir. (T) ____, ____, 69 F.3d 505, 508 (1995); *IKO*, ____ Fed. Cir. (T) at ____, 105 F.3d at 626–27.

Discussion

IBM challenges Customs' classification on two levels. First, IBM argues that Customs lacked the statutory authority to reclassify the subject imports without first providing notice because Customs' prior actions created an established and uniform practice ("EUP") under 19 U.S.C. § 1315(d). Second, and in the alternative, IBM argues that even if Customs had the authority to reclassify the subject Controllers and Drives, Customs nevertheless improperly classified them under 676.30, TSUS. According to IBM, Customs should have continued to classify the subject Controllers and Drivers under 676.54, TSUS, because that classification better describes these imports. The Court is unpersuaded by either of IBM's arguments, and addresses each in turn below.

I. Under 19 U.S.C. § 1315(d), Customs Was Not Required To Provide Notice Before It Reclassified The Subject Controllers And Drives Under Item 676.30, TSUS, Because There Was No Established And Uniform Practice.

IBM argues that before Customs reclassified the subject Controllers and Drives as "office machines," under Item 676.30, TSUS, Customs had an established and uniform practice of classifying the same Controllers and Drives as "parts of automatic data-processing machines," under Item 676.54, TSUS. As a result, IBM claims that pursuant to 19

U.S.C. § 1315(d), Customs was required to provide notice before it changed how it classified the subject Controllers and Drives.

An EUP may be created either by a finding of the Secretary of the Treasury ("Secretary") or by a finding of a court.[1] *Heraeus-Amersil, Inc. v. United States*, 4 Fed. Cir. (T) 95, 98–99, 795 F.2d 1575, 1580–81 (1986). IBM concedes that the Secretary has not made such a finding, thus the Court focuses only on whether the facts here support a judicial finding of an EUP.

IBM offers three grounds upon which this Court could make a judicial finding of an EUP for the classification of the subject Controllers and Drives. First, IBM asserts the existence of an EUP by pointing to the length of time during which Customs classified the subject merchandise under Item 676.54, TSUS. Second, IBM asserts that the existence of an EUP is substantiated by a statement of a National Import Specialist, noting that Customs has consistently classified the subject merchandise as parts of office machines. Third, IBM claims that there was an EUP due to the length of time that elapsed from the moment when Customs first considered classifying the subject merchandise under Item 676.30, TSUS, instead of Item 676.54, TSUS, until there was a final ruling supporting the new classification.

Although these factors are germane, they do not constitute an EUP because they do not evidence a uniform classification and liquidation of the subject imports at various ports over an extended period of time. The Controllers and Drives at issue in this case were uniformly classified and liquidated for only twenty months, April, 1985 to December, 1986, and only at one port, Minneapolis, Minnesota. *See Washington Handle Co. v. United States*, 34 C.C.P.A. 80 (1946) (finding that the uniform classification and liquidation of merchandise at two ports during the period of two years was insufficient to prove the existence of an EUP); *Siemens America, Inc. v. United States*, 1 Fed. Cir. (T) 9, 692 F.2d 1382 (1982) (finding that the uniform classification and liquidation of one hundred entries at one port over two years was insufficient to prove the existence of an EUP). Because the Court finds that Customs' actions during this period do not qualify as an EUP, the Court concludes that plaintiff was not entitled to notice pursuant to 19 U.S.C. § 1395(d) before Customs began to reclassify the subject merchandise under Item 676.30, TSUS.

II. The Subject Controllers And Drives Are Properly Classified Under Item 676.30, TSUS, As Unfinished "Office Machines," Not Specially Provided For.

In the alternative, IBM argues that the subject goods cannot be classified as "office machines" under 676.30, TSUS. Plaintiff asserts that in-

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[1] Before a court may make a judicial finding of an EUP, an importer must first exhaust its administrative remedies by requesting the Secretary to find an EUP, and the Secretary must fail to act. *Dow Chemical Co. v. United States*, 10 CIT 550, 560, 647 F.Supp. 1574, 1583 (1986). However, the applicable statute does not provide a procedure that importers should follow when they request a finding by the Secretary. *See* 19 U.S.C. § 1315(d). Nevertheless, the Court finds that IBM's protests constitute such a request because they clearly claim that an EUP for the classification of the subject Controllers and Drives existed. The Court further finds that when Customs denied the protests, the Secretary failed to act on IBM's requests. Consequently, the Court may make a finding of an EUP.

herent in the definition of an office machine is the existence of a base, as described in headnote 2(a) of 676.30, TSUS. According to plaintiff, the subject goods do not have such a base and, therefore, General Rule of Interpretation ("GRI") 10(h)[2] cannot be used to classify the subject goods as unfinished office machines. Thus, plaintiff concludes that the subject goods should be classified as "parts of office machines" under 676.54, TSUS.

The Court is unpersuaded by plaintiff's arguments. The Court finds that headnote 2(a) does not preclude the subject goods from being classified as office machines. Rather, the Court finds that the term "base" in headnote 2(a) is descriptive, and not a limiting factor. Moreover, pursuant to GRI 10(h), the subject goods may be defined as "unfinished" office machines because they meet the test established in *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States*, 66 C.C.P.A. 97, 600 F.2d 799 (1979). Since GRI 10(h) states that unfinished articles should be classified under the tariff descriptions for finished articles, the subject goods are correctly classified as unfinished "office machines not specially provided for," under 676.30, TSUS.

A. Headnote 2(a) of 676.30, TSUS, does not preclude the subject goods from being classified as office machines.

The Court finds headnote 2(a) does not preclude the classification of the subject goods under Item 676.30, TSUS. Plaintiff claims that the subject Controllers and Drives cannot be classified as unfinished "office machines," under Item 676.30, TSUS, unless they have a "base" as stated in headnote 2(a).[3] Drawing on *Crabtree Vickers, Inc. v. United States*, 79 Cust. Ct. 60 (1977), plaintiff interprets "base" as a word of limitation, that requires a degree of completion. Plaintiff then asserts that the Controllers and Drives do not have a "base" when they are imported, and argues that they will never have their own bases because they will be mounted on a rack within a rack enclosure after importation. Pl.'s Mem. Supp. Mot. Summ. J. at 3. The Court is unpersuaded.

Plaintiff's arguments miss their mark: headnote 2(a)'s requirement of a base is a description of the end good, not a word of limitation. In *Crabtree Vickers*, the court held that GRI 10(h) did not apply to an item of the TSUS that expressly required the merchandise to be "engraved or otherwise prepared for printing." 79 Cust. Ct. at 61. Therefore, an unengraved plate could not have been considered unfinished under 10(h). *Id.* However, on its facts, the present case is unlike *Crabtree Vickers*; item

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[2] GRI 10(h) reads: "unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished."

[3] In its answer to plaintiff's complaint, defendant admitted that the subject Controllers and Drives lack a "base" for the purposes of headnote 2(a), subpart G, part 4, schedule 6, TSUS. Headnote 2(a) defines "office machines" as devices which perform office work "and which have a base for fixing or placing them on a table, desk, wall, floor, or similar place."

After defendant filed its answer, this Court issued an opinion in which it defined the term "bases" as used in an unrelated subheading of the Harmonized Tariff Schedules of the United States. *See Universal Elect.*, ___ Fed. Cir. (T) ___, 105 F.3d 624 (1997). In light of this opinion, defendant made a motion for leave to amend its answer to assert that the subject Controllers and Drives have a "base." The Court found the *Universal Elect.* definition of "bases" inapposite and denied defendant's motion by an Order dated July 23, 1996.

676.30, TSUS does not require a minimum degree of completion which would prevent the application of GRI 10(h).

Plaintiff then argues that to be classified as an office machine a device must have a "base" at time of importation because the language of headnote 2(a) is "have a base" rather than "have or will have a base." Yet plaintiff's argument proves too much. The language of headnote 2(a) is "used" rather than "used or will be used." Hence, were this Court to extend plaintiff's logic to the other descriptions of headnote 2(a), no device could ever be classified as an "office machine" unless at the time of importation it is already "used in offices, shops, [and] factories * * *." The absurdity of this result leads the Court to conclude that headnote 2(a) is satisfied if an office machine will have a "base" attached to it after importation.

Finally, the Court finds that a base is attached to the subject Controllers and Drives after they are imported, thereby satisfying headnote 2(a). Plaintiff mistakenly assumes that for the purpose of headnote 2(a), each office machine must have a separate and individual base. This assumption is unsupported, and the Court declines to accept such a narrow construction. Instead, the Court finds that the rack in which the subject Controllers and Drives are placed after importation is a "base" for the purposes of headnote 2(a) because it allows them to be placed on and/or fixed to the floor.

B. General Rule Of Interpretation 10(h) may correctly be applied to item 676.30, TSUS.

Schedule 6 of the TSUS does not have a tariff description for unfinished office machines. Item 676.30, TSUS, on its face, only covers office machines, and is silent on whether they are to be finished or unfinished. According to the Tariff Commission, this is exactly the situation in which GRI 10(h) may be applied:

> In the existing schedules some tariff descriptions provide for an article "whether finished or unfinished" or with words of similar purport, and other tariff descriptions are silent on the question. * * * The proposed headnote [GRI 10(h)] will bring about desirable clarity and uniformity in this regard.

Tariff Classification Study, Submitting Report to the President and the Chairman of the Committee on Ways and Means of the House and the Committee on Finance of the Senate, Nov. 15, 1960, at 19, *quoted in J. Gerber & Co. v. United States*, 62 Cust. Ct. 368, 370, 298 F. Supp. 516, 518 (1969). Therefore, the Court concludes that GRI 10(h) may be applied to Item 676.30, TSUS, since this case is the type of situation envisioned by the Tariff Commission. The only remaining issue is whether the subject goods are satisfy the definition of unfinished under GRI 10(h).

C. The subject goods are unfinished for the purposes of GRI 10(h).

To decide whether an article is unfinished, both this Court and the Federal Circuit have followed the test established in *Daisy-Heddon*, 66

C.C.P.A. 97, 600 F.2d 799 (1979). *See, e.g., Simod America Corp. v. United States*, 7 Fed. Cir. (T) 82, 872 F.2d 1572 (1989), *XTC Products, Inc. v. United States*, 15 CIT 348, 771 F. Supp. 401 (1991). The court in *Daisy-Heddon* evaluated the following five factors in order to decide whether an import was an unfinished article: (1) how the number of omitted parts compares to the number of included parts; (2) how the amount of time and effort required to complete the article compares to the amount of time and effort it took to produce the imported article; (3) how the cost of the included parts compares to the cost of the omitted parts; (4) how significant the omitted parts are to the overall functioning of the completed article; and (5) how trade practice characterizes the article, e.g., finished or unfinished. *Daisy-Heddon*, 66 C.C.P.A. at 102, 600 F.2d at 803. The court in *Daisy-Heddon* cautioned that these factors do not constitute a formal test, and that the relevance of each factor turns on the facts of the particular case. *Id.*

The Court finds that several *Daisy-Heddon* factors indicate that the subject Controllers and Drives are unfinished office machines. First, when they are imported, both the Controllers and the Drives contain more components than they omit. For example, each Controller incorporates six components: (1) a system adapter; (2) a microprocessor; (3) random access read/write memory and read only storage; (4) a device adapter composed of a device interface adapter and a device read/write adapter; (5) cooling equipment; and (6) front and back control panels. Each Drive incorporates five components: (1) a disk enclosure comprising three disks; (2) 12 read/write heads; (3) the disk spindle of the drive motor; (4) two actuators; and (5) combined main air and breather filter. Each Controller and each Drive lack only a base, cable carriers, and the slide assemblies required for the rack-mounting.

Second, completing the Controllers and Drives requires significantly less time and effort than the time and effort needed to manufacture them to their imported form. Third, the omitted parts are currently cheaper than the parts already included in the Controllers and Drives, and will likely remain cheaper for the foreseeable future.[4] Thus, the Court concludes that the subject Controllers and Drives are classifiable as unfinished "office machines," under Item 676.30, TSUS.

III. The Subject Controllers And Drives Would Not be More Correctly Classified Under Item 676.54, TSUS, As "Parts" Of Office Machines.

Plaintiff claims that Customs should have classified the subject merchandise under Item 676.54, TSUS, as "parts of automatic data-processing machines." Pl.'s Mot. Summ. J. at 12. Plaintiff supports its claim under the criteria that this Court developed in *Sumitomo Corporation Of America v. United States*, 855 F. Supp. 1283, 18 C.I.T. 501 (1994)

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[4] The Court notes that it does not need to examine the last two *Daisy-Heddon* factors. In *Simod America*, 7 Fed. Cir. (T) at 90, 872 F.2d at 1578, the Federal Circuit found that under GRI 10(h), even the fourth factor, the absence of an essential part, would not preclude the classification of an article under the provision for the completed article. As for the fifth factor, neither party has presented any evidence of how the trade regards the subject merchandise.

(holding that voice coil positioning devices are "parts of automatic data processing machines" under 676.54, TSUS). Pl.'s Mot. Summ. J. at 12.

However, when an article is described by more than one provision of the TSUS, it should be classified under the provision that describes it most specifically. GRI 10(c). Additionally, a provision for "parts" of an article covers a product solely, or chiefly, used as a part of such article, but does not prevail over a specific provision for such part. GRI 10(ij). The term "specific provision" in GRI 10(ij) applies to a tariff provision which describes an article by either name, specific function, or generic term. *Norman G. Jensen, Inc. v. United States*, 77 Cust. Ct. 9, 21 (1976).

The Court finds that the term "office machines," as used in Schedule 6, Part 4, Subpart G of the TSUS is a "specific provision" for the purpose of 10(ij) because it refers to both the name and specific function of the subject goods. Item 676.30, TSUS, is not too broad to qualify as a "specific provision" because headnote 2(a) narrows its scope in three ways: it limits where the machine may be used; it limits what types of machines qualify; and it requires that an "office machine" have a "base" either before or after importation. *Compare with Mitsubishi Intern. Corp. v. United States*, 17 CIT 871, 884, 829 F. Supp. 1387, 1397 (1993) (holding that a provision for "lifting, handling, loading, or unloading machinery" is too broad to qualify as "specific provision").

Hence, this Court finds that even if the subject merchandise can be described under Item 676.54, TSUS, the subject Controllers and Drives are more specifically described by Item 676.30, TSUS. Thus, even if the subject goods could be defined as parts, the application of 10(ij) leads 676.30, TSUS, to prevail over the provision for "parts," Item 676.54, TSUS.

CONCLUSION

For the foregoing reasons, the court holds that the subject Controllers and Drives are properly classified under 676.30, TSUS. Judgment will be entered accordingly.

(Slip Op. 97–79)

LEVI STRAUSS & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–11–00726

[Plaintiff challenges Customs' liquidation and assessment of duty without deducting the value or costs of fabric cut-to-shape in the U.S. pursuant to subheading 9802.00.80 of the HTSUS. *Held:* Customs incorrectly failed to deduct the value or costs of the U.S. fabric; the "stonewashing" of the U.S. supplied fabric was minor and incidental to the assembly of the finished denim jeans.]

(Decided June 19, 1997)

Sandler, Travis & Rosenberg, P.A. (Edward M. Joffe, Jorge Espinosa and Arthur K. Purcell) for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(Saul Davis);* of counsel: *Laura R. Siegel,* Office of the Assistant Chief Counsel, United States Customs Service, for defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff Levi Strauss & Company ("Levi") brings this action to contest the denial of a protest by the United States Customs Service ("Customs") that sought duty allowances for U.S. origin cotton denim fabric components that were shipped to Guatemala for assembly and reentered into the U.S. Levi requested that the subject merchandise be allowed partial duty allowances under subheading 9802.00.80 of the HTSUS arguing that the cotton denim components were not advanced in value or improved in condition other than by the actual assembly or by minor operations incidental to assembly. Customs denied the protest on the basis that the "enzyme-washing" process, commonly referred to as stonewashing, placed the subject merchandise out of the purview of subheading 9802.00.80 because the finishing operations were not minor or incidental to assembly. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) and finds that enzyme-washing in this case was incidental to assembly and orders Customs to refund the amount of duty in question with interest.

BACKGROUND

The subject merchandise is 100% cotton denim fabric components manufactured in the U.S. and then exported to Guatemala for assembly into boy's cotton denim jeans known as style "550" five-pocket denim jeans. The denim fabric is cut-to-shape by Precision Cutting, Inc. in Spartanburg, S.C. and along with other components of the finished product including buttons, thread, zippers and other trim items, is transported to a Guatemalan assembler/laundry known as Koramsa, S.A. Koramsa assembled the denim jeans from the material supplied entirely by Levi. Immediately after assembly, the denim jeans were enzyme-washed, dried, pressed, labeled, inspected, sorted and packed for shipment to the U.S.

Upon importation into the U.S. in 1993, the subject merchandise was classified by Customs as boy's 100 percent cotton woven trousers under HTSUS subheading 6203.42.40 with a duty rate of 17.7% *ad valorem*. Levi timely filed a protest claiming that the cost or value of the U.S. cut-to-shape denim fabric components should have been deducted from the duty assessment under subheading 9802.00.80 of the HTSUS. Customs denied the protest on the grounds that the enzyme-washing process employed by Levi was not a minor operation incidental to the assembly process as contemplated by subheading 9802.00.80. Levi timely filed a summons and complaint with the Court contesting Customs' protest denial.

STANDARD OF REVIEW

Under 28 U.S.C. § 2639(a)(1), Customs' decision is "presumed to be correct" and the "burden of proving otherwise shall rest upon the party challenging such decision."[1] However, recent decisions from the Court of Appeals for Federal Circuit ("CAFC") have ruled that the presumption of correctness applies solely to factual questions and this Court's duty is to find the correct result.[2] The Court reviews the ultimate question in a classification case *de novo*. As the Court has found, classification decisions entail a three step process.

> The purely factual inquiry in every classification case involves determining what the subject merchandise is and what it does. The purely legal question involves determining the meaning and scope of the tariff provisions. The ultimate mixed question becomes whether the merchandise has been classified under an appropriate tariff provision, or equivalently, whether the merchandise fits within the tariff provision. This ultimate issue involves both a legal and factual component: indeed the ultimate issue is an inseparable hybrid of the discrete factual and legal inquiries and is therefore a mixed question of law and fact reviewable *de novo*.

Bausch & Lomb, Inc. v. United States, 21 CIT ___, ___, Slip Op. 97–16 at 6 (February 5, 1997). The purely factual inquiry is subject to the "clearly erroneous" standard while the purely legal question and the ultimate mixed question of law and fact are reviewable *de novo*. *Id.* at 12.

Although this case comes before the Court for a review of Customs classification pursuant to 28 U.S.C. § 1581(a), the issue involved does not confront nor generate the typical classification considerations. Unlike most classification reviews, there is no contention between the par-

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[1] 28 U.S.C. § 2639(a)(1) (1994).

[2] The duty of the Court to find the correct result in a classification case stems from both legislative and judicial sources. "[T]he trial court * * * must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative. * * * [T]he court's duty is to find the correct result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878 (1984). "If the Court of International Trade is unable to determine the correct decision on the basis of the evidence presented in any civil action, the court may order a retrial or rehearing for all purposes, or may order such further administrative or adjudicative procedures as the court considers necessary to enable it to reach the correct decision." 28 U.S.C. § 2643(b). *See Goodman Mfg., Inc. v. United States*, 13 Fed. Cir. (T) ___, ___, 69 F.3d 505, 508 (1995) (the statutory presumption of correctness attaches only to an agency's factual determinations) *and Rollerblade, Inc. v. United States*, 15 Fed. Cir. (T) ___, ___, Ct. No. 96–1397 at 6 (1997) (legal issues are not afforded deference under 28 U.S.C. § 2639 or under the administrative deference standard promulgated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).

ties as to competing tariff provisions: under subheading 9802.00.80 the subject merchandise either satisfies the statute or it does not. Therefore, the purely legal question found in most classification cases has already been answered. Further, the parties in the instant case have no argument as to the material facts at issue thereby precluding the need to answer the purely factual questions involved in a classification case. What remains is the ultimate mixed question of law and fact, or whether the facts satisfy or fit the statutory standard which the Court reviews *de novo* to determine the correct result.

DISCUSSION

Levi contests Customs' denial of a protest seeking duty allowances under HTSUS subheading 9802.00.80 for the U.S. origin cut-to-shape denim fabric components shipped to Guatemala and reentered into the U.S. Customs denied the duty allowance based on the conclusion that the enzyme-wash performed in Guatemala advanced the value or improved the condition of the U.S. origin components in a significant manner thereby placing the subject merchandise outside the scope of subheading 9802.00.80. The statute together with its legislative history and relevant case law lead the Court to find that the added value or improvement in condition provided by the enzyme-wash was minor and incidental to the assembly process qualifying the subject merchandise for duty allowance under subheading 9802.00.80.

Subheading 9802.00.80 provides that:

> Articles, except goods of heading 9802.00.90, assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.
>
> [With a general rate of duty of:]
>
> A duty upon the full value of the imported article, less the cost or value of such products of the United States * * *.

HTSUS subheading 9802.00.80 (1996). In order for goods to be allowed 9802.00.80 status, all three subparts must be satisfied. In the instant case, the parties are not contesting subparts (a) and (b) of subheading 9802.00.80. The parties and the Court agree that the first section of subpart (c) is not at issue since the enzyme-wash does advance the value of the denim fabric components as well as improve their condition. This leaves a single question of whether the enzyme-wash falls into the exception of subpart (c): is the enzyme-wash an operation incidental to the assembly process?

The legislative history of HTSUS subheading 9802.00.80 is illuminating. The predecessor of subheading 9802.00.80, item 870.00 of the TSUS was amended in 1965 and the House Report states:

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. * * * Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

H.R. Rep. No. 88–1728, at 46 (1964). The predecessor to the CAFC, the U.S. Court of Customs and Patent Appeals, interpreted the language of the legislative history and forged a set of criteria to determine whether a process is incidental to assembly in *United States v. Mast Industries, Inc.*, 69 CCPA 47, 668 F.2d 501 (1981). The *Mast* court found that the "legislative intent was to not preclude operations that provide an 'independent utility' or that are not essential to the assembly process; rather, Congress intended a balancing of all relevant factors to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.* at 53–54, 668 F.2d 506. The *Mast* court then listed the relevant factors useful in ascertaining whether a process is incidental to assembly:

> (1) Whether the cost of the operation relative to the cost of the affected component and the time required by the operation relative to the time required for assembly of the whole article were such that the operation may be considered "minor."
>
> (2) Whether the operations in question were necessary to the assembly process * * *.
>
> (3) Whether the operations were so related to assembly that they were logically performed during assembly.
>
> [(4) W]hether economic or other practical considerations dictate that the operations be performed concurrently with assembly.[3]

Id. (citations omitted). The application of these so-called "Mast factors" facilitates the Court's resolution of whether the enzyme-wash employed by Levi is incidental to the assembly of the imported denim jeans.

I. Cost and Time Comparisons

The first *Mast* factor is composed of a cost element and a time element. In weighing these elements, courts have first been obliged to define the scope of the contested operation as well as the scope of the comparative assembly process. In a recent CAFC decision reviewing duty allowance for an intricate painting procedure, the court defined the scope of the contested operation to be comprised of the total of all of the painting steps in order that item 807.00 was not undermined "by al-

[3] The fourth factor was not at issue in *Mast* but the court noted its potential relevance in other actions.

lowing major and significant operations to be broken down to a point where each step could be called minor." *General Motors Corp. v. United States*, 16 Fed. Cir. (T) ____, ____, 976 F.2d 716, 720 (1992). Since the scope of the enzyme-wash procedure at issue here is well-defined, the danger lies in defining the scope of the comparative assembly process; limiting the scope of the comparative assembly process directly increases the importance of the operation which would allow potentially minor steps to be built up to major and significant operations.

The Court notes the subtle difference in the wording between the cost comparison and time comparison in *Mast*. The *Mast* court perspicaciously compared the "cost of the operation relative to the cost of the *affected component*" which properly measures the relative importance of the process at issue with the subject merchandise considered for the duty allowance.[4] The correct cost comparison is accordingly made between the cost of the enzyme-wash process and the cost of the denim fabric components, which is the subject of the duty allowance at issue here. Model cost comparisons measure the percentage of relative specific costs by simply dividing the cost of the process by the component cost which yields a percentage representing that specific costs' relative importance. Applying that methodology, the relative cost is computed by dividing the enzyme-wash cost of $.80 by the denim fabric cost of $2.96 resulting in a figure of 27%.

In *General Motors*, the CAFC also compared capital investment costs in its overall cost determination. *General Motors Corp. v. United States*, 16 Fed. Cir. (T) ____, ____, 976 F.2d 716, 721. Levi uses the same capital equipment for all of its washing operations. The Court finds that the capital investment cost, therefore, is minor. Taken together, the cost of the enzyme-wash relative to the denim fabric components and the capital investment cost are minor and incidental to the assembly process. The Court finds that the cost comparison weighs in favor of granting the duty allowance for the denim fabric components at issue.

Time comparisons provide concurring results. In contrast to the cost comparison, the time comparison promulgated from the *Mast* court gauged "the time required by the operation relative to the time required for assembly of the *whole article*." *United States v. Mast Industries, Inc.*, 69 CCPA 47, 54, 668 F.2d 501, 506 (1981) (emphasis added). Levi washes 296 pairs of denim jeans in a single wash which takes 99 minutes. Customs argues that the total enzyme-wash time of 99 minutes must be used for each garment assembled. The Court disagrees with that analysis since this would allow potentially minor steps to be built up to major and significant operations. The correct wash time per garment is determined by dividing the time of the wash by the number of garments washed. The result is that the enzyme-wash takes .334 minutes per garment. The per garment total assembly time is nineteen minutes. The relative time is calculated by dividing the per garment wash time by the

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[4] *United States v. Mast Industries, Inc.*, 69 CCPA 47, 54, 668 F.2d 501, 506 (1981) (emphasis added).

per garment total assembly time which results in a 1.1% relative time. The Court finds that 1.1% represents a minor time interval and, together with the cost comparisons, is incidental to the assembly process.

II. Necessary to the Assembly Process

Although enzyme-washing is closely related to the assembly process, the process cannot be said to be necessary to the assembly process. In manufacturing other apparel, Levi sends fully assembled garments to separate enzyme-washing facilities. In fact prior to installation of the enzyme-wash machinery in Guatemala, Levi shipped the assembled denim jeans to U.S. finishing facilities where the enzyme-wash was conducted. The Court finds that the enzyme-wash procedure is not necessary to the assembly process and this factor weighs against granting the duty allowance under subheading 9802.00.80.

III. Logically Performed During Assembly

The third *Mast* factor assesses the need for the performance of the enzyme-washing operation during the assembly process. Customs argues that the enzyme-wash is "not at all directly related to the sewing operations which constitute assembly here." Def.'s Post Trial Br. at 29. This claim, however, ignores the true focus of this factor which is whether the operation in question is logically performed during the assembly process. The entire inquiry may be aptly described as determining whether there is a direct relationship between the enzyme-wash and the whole assembly process performed overseas, but the Court finds that the aim of the third *Mast* factor is to ascertain whether the enzyme-wash is logically performed during the assembly process. Levi has asserted that the enzyme-wash is "more sensibly performed under the same roof at the assembly plant" which is "due to the nature of the process and the requirement that it be completed prior to the other finishing operations." Pl.'s Post Trial Br. at 9. The Court finds the enzyme-wash operation is logically performed at the situs of the assembly process where all other assembly and post-assembly steps are performed and where the trained personnel are located. Transferring the enzyme-wash process would entail the utilization of a separate set of production factors which the Court finds would favor the performance of the enzyme-wash at the plant in Guatemala. This *Mast* factor weighs in favor of providing duty allowance to the denim fabric under subheading 9802.00.80.

IV. Economic and Practical Considerations

Customs contends that this criterion has no bearing on the resolution of the issue before the Court. Customs states,

> both item 807.00 (a) and (c) contemplate that there will be prohibitory non-assembly operations performed concurrently with assembly. Therefore, if this factor were utilized, as indicated by *Mast*, it would essentially eviscerate the clearly stated prohibited operations contemplated by item 807.00 (a), and the prohibited advancements in value or improvements in condition performed before, during, or after assembly, which are implicit in item 807.00 (c).

Def.'s Post Trial Br. at 29–30. Customs' interpretation of the fourth *Mast* factor is mistaken. The fourth *Mast* factor does not violate either subpart (a) or (c) of item 807.00; in fact, as stated in this opinion and agreed to by the parties, the sole question at issue is outside of the purview of subpart (a) and the first element of subpart (c), which Customs calls into question here.

Levi states that there are numerous economic and practical reasons for conducting the enzyme-wash at the situs of the assembly plant in Guatemala. Levi argues that its ability to detect and correct sewing and laundry defects would be compromised since these defects are more easily discovered after washing the garment. Pl.'s Post Trial Br. at 9. Levi also contends that performing the enzyme-wash on site in Guatemala produces more first quality garments and reduces the time it takes to get the garments to the buyer. *Id.* at 9–10. Additional labor costs would also be incurred if the enzyme-wash process were performed in the U.S. as the garments would have to be unpacked and repackaged. *Id.* at 10. The Court finds that there are economic and practical advantages of performing the enzyme-washing operation at the site of final assembly. This factor weighs in favor of granting duty allowance under subheading 9802.00.80.

V. Protection of the U.S. Industry

Customs makes a broad policy argument concerning what Customs proclaims as Levi's embarkation on a course of moving operations overseas that will negatively impact on the U.S. domestic industry. Def.'s Post Trial Br. at 2. Customs states,

> It is a basic principle of Customs jurisprudence that tariff laws were intended to raise revenues and were enacted to "encourag[e] the industries of the United States.["] [sic] While Levi may generally be considered a domestic company, when we are discussing the transfer of United States operations abroad the real domestic industry that is protected and must be "encouraged" by the limitations Congress placed upon the grant of duty free treatment in heading 9802 is the United States finishing industry that may be seriously injured by the transfer of finishing operations abroad, and the domestic industry that manufactures machinery and equipment in the United States that is clearly going to be injured by the transfer of finishing operations to Guatemala, which purchases archaic equipment from Korea due to Guatemala's low labor costs.

Def.'s Post Trial Br. at n.1 (citation omitted). The Court notes that this argument is misplaced. The parties have not submitted and the Court is not aware of any evidence to substantiate the claim that the legislative intent behind subheading 9802.00.80 and its predecessor item 807.00 was to protect the domestic industry from U.S. companies' moving operations offshore. The only discussions of the intent behind the enaction

of item 807.00 was to allow U.S. produced goods to compete with foreign made goods, which is exactly what Levi has done here.[5]

The argument that Customs forwards cuts both ways. By denying the duty allowance, there is a further benefit to the U.S. company to relocate their entire operation offshore. Recognizing this danger Chief Judge Nies warned that "[b]ecause of the denial of the deduction for these United States components, another part of the fabrication of automobiles in the United States will likely be lost. This cannot be the intent of Congress." *General Motors Corp. v. United States*, 16 Fed. Cir. (T) ____, ____, 976 F.2d 716, 723 (1992). What is to prevent Levi from moving the fabric manufacturing and cutting operations offshore when the denial of duty allowance increases domestic costs beyond the costs incurred overseas? The Court is reluctant to wade into these turbulent policy waters particularly when neither the statute nor its legislative history compel the Court.

VI. Other Considerations

Finally, the Court finds that the enzyme-wash is analogous to cleaning and painting which the statute specifically lists as being minor and incidental to the assembly processes. The enzyme-wash does not add anything to the denim fabric, it simply removes a measure of the indigo dye and gives the denim fabric a certain amount of abrasion that would naturally come from washing and wearing the denim jeans. Further, the enzyme-wash does not change the composition or structure of the denim fabric. Similarly, in *Haggar Apparel Co. v. United States*, 20 CIT ____, 938 F. Supp. 868 (1996), the Court found that the curing operation which imparted crease retention and seam and surface flatness to men's pants was minor and incidental to the assembly process. The enzyme-wash is directly comparable to the curing operation in *Haggar* and the Court finds that the same reasoning and conclusion are applicable to the instant case.

Taken as a whole, the *Mast* factors as applied to the instant case and all other considerations weigh in favor of granting the duty allowances. Both cost and time comparisons are evidence that the enzyme-wash is incidental to the assembly process involved in producing the denim jeans in question. The enzyme-wash procedure is not necessary to the assembly process but it is logically, economically and practically performed in conjunction with the assembly process. Therefore, the balancing of all of the relevant factors before the Court weighs in favor of granting the duty allowance under subheading 9802.00.80 for the U.S. produced denim fabric.

CONCLUSION

For the foregoing reasons, the Court finds that the denim fabric is correctly classified under HTSUS subheading 9802.00.80.

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[5] *See Free List, Special and Administrative Provisions: Hearings on the Tariff Act of 1929 Before the Committee on Finance*, 71st Cong. Vol. 6, 125–134 (1929).

(Slip Op. 97–80)

FORMER EMPLOYEES OF PENN VIRGINIA OIL AND GAS CORP., PLAINTIFF *v.* ROBERT B. REICH, SECRETARY OF LABOR, DEFENDANT

Court No. 96–06–01612

(Dated June 18, 1997)

ORDER

MUSGRAVE, *Judge:* This Court having remanded this case to the Department of Labor, and the Department of Labor having filed the remand results on February 3, 1997, upon consideration of the Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance with respect to workers at Penn Virginia Oil and Gas Corporation, the Notice of Negative Determination on Reconsideration on Remand with respect to workers at Penn Virginia Oil and Gas Corporation, Defendant's comments upon the Remand Results, the administrative record, and other pertinent papers, it is hereby

ORDERED that judgment is entered in favor of the defendant sustaining the Negative Determination, and it is further

ORDERED that this action is dismissed.

(Slip Op. 97–81)

TORRINGTON CO., PLAINTIFF AND DEFENDANT-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND NMB THAI LTD., PELMEC THAI LTD., NMB HI-TECH BEARINGS LTD., AND NMB CORP., DEFENDANT-INTERVENORS AND PLAINTIFFS

Consolidated Court No. 95–03–00353

Plaintiff and defendant-intervenor The Torrington Company ("Torrington") moves this Court pursuant to Rule 56.2 of the Rules of this Court challenging certain aspects of the administrative reviews of the Department of Commerce, International Trade Administration ("Commerce"), of antifriction bearings from Thailand, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders ("Final Results")*, 60 Fed. Reg. 10,900 (1995). Torrington contests the following actions by Commerce: (1) calculation of profit based upon class or kind of merchandise or statutory minimum rather than upon reported sample sales of such or similar merchandise; (2) inclusion of Route B sales in home market database; (3) adjustment to foreign market value ("FMV") for freight expenses for Route B sales; (4) acceptance of billing adjustments on U.S. and home market sales; (5) acceptance of reported early payment discounts; and (6) acceptance of ocean and air freight costs reported on a commingled basis.

Defendant-intervenors and plaintiffs NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation (collectively "NMB") claim that Commerce erred in:

(1) including research and development ("R&D") expenses related to non-subject merchandise in calculating cost of production and constructed value and failing to allocate R&D expenses of Minebea Co., Ltd. ("Minebea Japan") over the total consolidated cost of its sales; and (2) adding packing expenses to FMV twice.

Held: Torrington's motion for judgment on the agency record is denied. NMB's motion for judgment on the agency record is granted to the extent that this case is remanded to Commerce to: (1) allocate Minebea Japan's R&D expenses over its total consolidated cost of sales; and (2) correct the clerical error resulting in the double-counting of NMB's packing expenses. Commerce is sustained with respect to all other issues.

[Plaintiff and defendant-intervenor Torrington's motion is denied. Defendant-intervenor and plaintiff NMB's motion is granted in part and denied in part.]

(Dated June 23, 1997)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., William A. Fennell, Amy S. Dwyer, Olufemi Areola, Geert De Prest, Patrick J. McDonough and *Timothy C. Brightbill)* for The Torrington Company.

White & Case (Walter J. Spak, William J. Clinton and *David E. Bond)* for NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Mark A. Barnett, Michelle K. Behaylo, Stacy J. Ettinger, Thomas H. Fine, Dean A. Pinkert*, and *David J. Ross*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff and defendant-intervenor The Torrington Company ("Torrington") moves this Court pursuant to Rule 56.2 of the Rules of this Court for judgment on the agency record challenging aspects of the final determination of the Department of Commerce, International Trade Administration ("Commerce"), of the fourth administrative review of antifriction bearings ("AFBs") from Thailand, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders ("Final Results"),* 60 Fed. Reg. 10,900 (1995). Defendant-intervenors and plaintiffs NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation (collectively "NMB") oppose Torrington's motion and also challenge Commerce's fourth administrative review of AFBs from Thailand.

BACKGROUND

On May 15, 1989, Commerce published the antidumping duty orders on AFBs from Thailand. *See Antidumping Duty Order and Amendment to the Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand*, 54 Fed. Reg. 20,909 (1989). The fourth administrative review encompasses imports of AFBs entered during the period of May 1, 1992 through April 30, 1993. The present consolidated action concerns imports from Thailand.

On February 28, 1994, Commerce published the preliminary results of the fourth administrative review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germa-*

ny, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent To Revoke Orders (in Part), 59 Fed. Reg. 9,463 (1994). On February 28, 1995, Commerce published the Final Results at issue. *See Final Results*, 60 Fed. Reg. at 10,900.

Torrington contests the following actions of Commerce: (1) calculation of profit based upon class or kind of merchandise or statutory minimum rather than upon reported sample sales of such or similar merchandise; (2) inclusion of Route B sales in home market database; (3) adjustment to foreign market value ("FMV") for freight expenses for Route B sales; (4) acceptance of billing adjustments on U.S. and home market sales; (5) acceptance of reported early payment discounts; and (6) acceptance of reported ocean and air freight costs.

NMB claims that Commerce erred by: (1) including research and development ("R&D") expenses related to non-subject merchandise in calculating cost of production and constructed value and failing to allocate R&D expenses of Minebea Co., Ltd. ("Minebea Japan") over the total consolidated cost of its sales; and (2) adding packing expenses to FMV twice.

On May 3, 1995, the Court granted Torrington's motion for a preliminary injunction enjoining the liquidation of the subject entries for the duration of this litigation.

DISCUSSION

The Court's jurisdiction in this action is derived from 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd*, 894 F.2d 385 (Fed. Cir. 1990).

1. *Calculation of Profit:*

In the Final Results at issue, Commerce calculated profit for constructed value on the basis of class or kind of merchandise. If the profit amount was less than the statutory minimum of eight percent, Commerce used the statutory minimum. *Final Results*, 60 Fed. Reg. at 10,923. Torrington contends that Commerce erred by not relying on reported sample sales of such or similar merchandise. According to Torrington, Commerce should have presumed that profit based on sales of such or similar merchandise, as reported by respondents, would be rep-

resentative of the profit for the general class or kind of merchandise. Torrington's Mem. Supp. Mot. J. Agency R. at 21–24.

The Court has previously addressed and rejected Torrington's argument pertaining to this issue. In *Federal-Mogul Corp. v. United States*, 20 CIT at ____, ____, 918 F. Supp. 386, 403–04 (1996), the Court held that while Commerce has the authority to select appropriate samples for determining U.S. price and FMV pursuant to 19 U.S.C. § 1677f–1 (1988),[1] *Commerce also has the discretion not to use samples at all. See also Torrington Co. v. United States*, 21 CIT ____, ____, 960 F. Supp. 339, 343–44 (1997); *INA Walzlager Schaeffler KG v. United States*, 21 CIT ____, ____, 957 F. Supp. 251, 270–71 (1997). In accordance with prior decisions of this Court, Commerce is sustained on this issue.

2. *Inclusion of Route B Sales in Home Market Database:*

Torrington contests Commerce's decision to include NMB's Route B sales in the home market database. Torrington argues that NMB failed to establish that its Route B sales were in the ordinary course of trade as defined by 19 U.S.C. § 1677(15) (1988). Torrington maintains that Commerce's conclusion that the sales were in the ordinary course of trade is inconsistent with Commerce's determinations in the original investigation and other cases. Torrington's Mem. Supp. Mot. J. Agency R. at 26–31. Torrington further asserts that NMB did not demonstrate that its Route B sales consisted of ball bearings produced in Thailand subject to this investigation. *Id.* at 31–32.

Commerce responds that it properly classified NMB's Route B sales as home market sales once it determined that the first sales to unrelated parties occurred in Thailand. Commerce also insists that the sales are in the ordinary course of trade even though the trade route of Route B sales differs from that of Route A sales. Commerce explains that because NMB is subject to government restrictions on sales in Thailand, it was reasonable for NMB to devise a method to circumvent the restrictions in order to increase sales in the home market. Def.'s Partial Opp'n to Mots. J. Agency R. at 13–14.

Commerce further argues that Torrington failed to exhaust its administrative remedies regarding its contention that NMB did not demonstrate that its Route B sales are produced in Thailand. In the alternative, Commerce insists it verified that Route B ball bearings were indeed produced in Thailand. *Id.* at 14–16.

NMB agrees with Commerce's treatment of its Route B sales. NMB argues that the types of sales that fall within the definition of sales in the ordinary course of trade vary from one country to another. NMB explains that the AFBs are shipped out of Thailand prior to the sale of the merchandise because the Thai customs authority restricts direct shipments from a bonded facility to a customer with Board of Investment

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[1] 19 U.S.C. § 1677f–1(b) states:

> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

status.[2] NMB's Opp'n to Mot. J. Agency R. at 8–9. NMB further contends that, in contrast to the Route B sales involved in the original investigation, none of the Route B sales in this review were made to unrelated parties in Singapore. *Id.* at 10–11.

Torrington raised this same issue in a challenge to the third administrative review. *See Federal-Mogul*, 20 CIT at ____, 918 F. Supp. at 416–18. After remanding this issue to Commerce to explain its reasons for treating Route B sales as home market sales, the Court upheld Commerce's decision after determining that NMB's Route B sales never entered the commerce of Singapore. *Federal-Mogul Corp. v. United States*, 20 CIT ____, ____, 950 F. Supp. 1179, 1184 (1996), *appeals docketed*, No. 97–1253 (Fed. Cir. Feb. 27, 1997), No. 97–1321 (Fed. Cir. Apr. 18, 1997). The facts of this case are identical to those of the third administrative review. Therefore, the Court adheres to its prior decision and upholds Commerce's decision to treat NMB's Route B sales as home market sales.

3. *Adjustment for Freight Expenses of Route B Sales:*

In the Final Results, Commerce treated NMB's post-sale home market freight expenses as direct selling expenses and its pre-sale home market freight expenses as indirect selling expenses. 60 Fed. Reg. at 10,942. Torrington contends that even if the Court upholds Commerce's decision to include NMB's Route B sales in the home market sales database, the Court should find that Commerce erred by not rejecting all adjustments for freight expenses incurred for transporting Route B sales from Thailand to Singapore and back to Thailand. According to Torrington, such expenses were not related to sales of bearings in Thailand but, rather, were general expenses incurred for the purpose of receiving government benefits. Torrington's Mem. Supp. Mot. J. Agency R. at 33–34.

In rebuttal, Commerce claims that there is no factual or legal basis for denying the adjustments for expenses actually incurred even if such expenses were incurred to avoid value-added taxes and import duties. Def.'s Partial Opp'n to Mots. J. Agency R. at 18. NMB essentially agrees with the position taken by Commerce. NMB's Opp'n to Mot. J. Agency R. at 11–12.

In *Federal-Mogul*, 20 CIT at ____, 918 F. Supp. at 418, the Court affirmed Commerce's decision to adjust FMV for freight expenses associated with Route B sales. In the case at bar, however, Torrington raises some new arguments that need to be addressed. The crux of Torrington's argument is that the freight expenses are not "selling" expenses and, therefore, may not be deducted from FMV. The United States Court

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[2] The Board of Investment of the Thai government offers certain incentives, such as import duty and corporate income tax exemptions to certain foreign investors. As a result, many Thai original equipment manufacturers are subsidiaries of foreign companies that have been granted exemptions by the Board of Investment. In addition, the Thai customs authority has granted NMB status as a bonded factory, meaning NMB imports raw materials free of import duties and taxes. Thai law requires approval of the Thai customs authority for direct sales from a bonded factory to a customer with Board of Investment privileges. NMB claims the approval process is extremely time consuming and, therefore, in order to sell to customers in Thailand with Board of Investment status, NMB factories must ship their merchandise out of Thailand prior to selling the merchandise to most original equipment manufacturers in Thailand. NMB's Opp'n to Mot. J. Agency R. at 8–9.

of Appeals for the Federal Circuit ("CAFC") in *Torrington Co. v. United States*, 68 F.3d 1347, 1356 (Fed. Cir. 1995), held that Commerce may deduct indirect home market transportation expenses from FMV pursuant to the exporter's sales price ("ESP") offset cap. *See also Torrington Co. v. United States*, 82 F.3d 1039, 1047 (Fed. Cir. 1996). The Court determined above that NMB's Route B sales were properly classified as home market sales. Therefore, because the freight expenses at issue were incurred as a result of these home market sales, Commerce properly deducted the expenses from FMV pursuant to the ESP offset cap.

4. *Billing Adjustments:*

Torrington contests Commerce's acceptance of NMB's reporting of various billing adjustments on U.S. and home market sales. Torrington alleges that the billing adjustments reported do not accurately reflect U.S. and home market sales because a variety of the adjustments may have been made as much as five years or more after the sales under review. Torrington stresses that because verification did not occur until December 1993 and January 1994, Commerce could have verified whether additional billing adjustments were made after June 1993.[3] According to Torrington, Commerce had an obligation to investigate whether the submitted prices should have been relied upon in light of the fact that NMB's reported sales prices may be subject to change for a period of five years or more after the period under review. Torrington's Mem. Supp. Mot. J. Agency R. at 36–37.

Torrington further argues that Commerce's treatment of NMB's billing adjustments was inconsistent with its treatment of other post-sale price adjustments ("PSPAs"). Torrington explains that while Commerce generally requires PSPAs to be tied directly to the sales under consideration, in this instance, Commerce relied on prices based on billing adjustments that may have occurred up to five years after the original sales. To avoid the use of strategies intended to reduce antidumping duty liability, Torrington asserts that Commerce should have at least disallowed favorable adjustments to U.S. and home market prices. *Id.* at 38–39

Commerce counters that it properly allowed NMB's billing adjustments because NMB submitted a complete and accurate response to Commerce's request for information. Commerce emphasizes that the data NMB provided was as up-to-date as possible given the deadline for questionnaire responses. Def.'s Partial Opp'n to Mots. J. Agency R. at 20–21. Commerce further argues that it was unlikely that any significant quantity of billing adjustments relating to sales during the period of review occurred after the period covered by the response, and that any possible additional adjustments could serve either to decrease or increase the margins. *Id.* at 21–22.

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[3] NMB's questionnaire response indicates that it traced sales adjustments to original sales through the end of June 1993. *Response of NMB to Supplemental Questionnaire*, P.R. Doc. No. 38, at 3–4. Torrington's App.

Defendant-intervenor and plaintiff NMB asserts that, in accordance with Commerce's instructions, it reported billing adjustments on a transaction-specific basis. NMB insists that Commerce's thorough on-site verification revealed only one minor discrepancy. NMB further maintains that billing adjustments by definition occur after sales are made and, therefore, should be considered part of the original sales transactions regardless of when they are made. NMB's Opp'n to Mot. J. Agency R. at 13–15.

The Court recently addressed this issue with regard to the imports of NMB/Pelmec Singapore during the fourth administrative review period. The Court upheld Commerce's acceptance of NMB's billing adjustments as being supported by both the record and law. *Torrington Co. v. United States*, 21 CIT ___, ___, Slip Op. 97–57, at 8–10 (May 14, 1997). The Court found that Torrington's position would create an undue burden on Commerce with minimal contribution to the accuracy of computing dumping margins. *Id.* Again, a review of the record indicates that the number of instances in which billing adjustments occurred more than three years after the original sales was minimal. *See Response of NMB to Supplemental Questionnaire*, P.R. Doc. No. 38, at Attach. 3, Torrington's App. As the facts of this case are almost identical to those in the prior decision involving NMB/Pelmec Singapore, the Court adheres to its holding and sustains Commerce on this issue.

5. *Early Payment Discounts:*

In the Final Results, Commerce adjusted ESP for early payment discounts finding that NMB properly tied the discounts to particular sales. 60 Fed. Reg. at 10,930. Torrington challenges Commerce's acceptance of NMB's reporting methodology of early payment discounts which failed to exclude non-scope merchandise. According to Torrington, NMB failed to report the discounts on a transaction-specific basis even though NMB maintained adequate records to allow transaction-specific reporting. Torrington urges the Court to require Commerce to substitute best information available ("BIA") for NMB's reported discounts. Torrington's Mem. Supp. Mot. J. Agency R. at 40–42.

In response, Commerce claims it verified that NMB accurately reported and properly tied the discounts to particular invoices and to in-scope merchandise. Commerce argues that there is no record evidence to support Torrington's claim that NMB employed a methodology resulting in the allocation of early payment discounts to sales of scope and non-scope bearings. Def.'s Partial Opp'n to Mots. J. Agency R. at 22–24.

NMB explains that it granted early payment discounts to two customers who purchased in-scope and out-of-scope merchandise. According to NMB, the percentage of invoice value used to determine the amount of the early payment discount was identical for both in-scope and out-of-scope merchandise. NMB states that because the discount was earned as a percentage of the invoice price, NMB allocated the amount of the total early payment discount over the total invoice value of the merchandise subject to the lump-sum payments of the customers and reported the

discounts on a transaction-specific basis. NMB insists that its methodology was consistent with Commerce practice and with prior Court decisions. NMB's Opp'n to Mot. J. Agency R. at 16–17 (citing *NSK Ltd. v. United States*, 19 CIT ____, ____, 896 F. Supp. 1263, 1273 (1995), *rev'd on other grounds*, 1997 WL 307768 (Fed. Cir. June 10, 1997)).

Commerce makes adjustments to ESP for early payment discounts pursuant to 19 U.S.C. § 1677a. Such adjustments are made in order to arrive at an accurate price at which the merchandise at issue is sold in the United States. *See* 19 U.S.C. § 1677a(c). Unlike adjustments to FMV pursuant to the ESP offset provision, Commerce may make adjustments to ESP for both direct and indirect expenses. *See Torrington*, 82 F.3d at 1049.[4]

The Court agrees with Torrington to the extent that Commerce must be able to separate early payment discounts granted on in-scope merchandise from those granted on out-of-scope merchandise in order to make an accurate adjustment to ESP. Torrington's conclusion that Commerce was unable to make such a distinction, however, is incorrect. Torrington focuses on NMB's reporting methodology rather than Commerce's verification. In *NSK*, 896 F. Supp. at 1273, the Court stated the following in reference to discounts deductible from FMV:

> [D]iscounts paid on subject merchandise can be allocated over all sales of the merchandise as long as discounts paid only on the subject merchandise are used to calculate the per-unit amount of discounts to be deducted, and the discounts "can be directly correlated with specific merchandise using verified cost and sales information."

(Quoting *Smith-Corona Group v. United States*, 713 F.2d 1568, 1580 (Fed. Cir. 1983)). While NMB was unable to report the discounts on an invoice-specific basis, Commerce was able to calculate discounts on a per-unit basis and directly correlate the discounts to specific merchandise through verified cost and sales information as evidenced by the following statements by Commerce in its verification report:

> Early payment discounts were applicable to two customers * * *. We were first shown the total discounts for the [period of review]. This was then broken down into product category. We looked at July 1992. There were two payments * * * covering several invoices. It was explained that the customer takes the invoice amount less the freight and applies the discount percentage. We examined the invoices and matched these to the payment voucher listing. The difference between the invoice amount and the payment corresponded to the discount reported. The discount was divided between M&I and Pelmec based on invoiced sales amount. We repeated this process for the other customer. * * * We found no discrepancies.

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[4] In *Torrington*, 82 F.3d at 1050–51, the CAFC held that Commerce must rely on the calculation of PSPAs rather than the allocation of such adjustments in determining whether such expenses are direct expenses and, therefore, properly deducted from FMV pursuant to the ESP offset regulation. While the CAFC shifted the analysis from this Court's focus on whether Commerce was able to separate expenses incurred for sales of in-scope merchandise from those incurred for out-of-scope merchandise for the purpose of determining the proper adjustment to FMV, the CAFC did not alter the analysis for adjustments to ESP.

NMB Thailand & NMB Singapore U.S. Sales Verification Report, P.R. Doc. No. 41, at 9–10, Torrington's App. Since the percentage used to calculate the discount amount was the same for both in-scope and out-of-scope merchandise, Commerce was able to tie the relevant discounts to in-scope merchandise. Accordingly, the Court finds Commerce's actions to be consistent with law and supported by the administrative record.

6. *Air and Ocean Freight Expenses:*

Torrington contends that Commerce erred in accepting NMB's reported air and ocean freight expenses on a commingled basis. According to Torrington, NMB failed to comply with questionnaire instructions to report air and ocean freight expenses on "a per unit and transaction-by-transaction basis." Torrington's Mem. Supp. Mot. J. Agency R. at 43.

Torrington also points out that NMB did not separate air freight expenses from ocean freight expenses on a customer-specific basis in spite of a request from Commerce to do so in a deficiency letter. Torrington challenges NMB's claim and Commerce's final determination that NMB could not link each shipment to individual U.S. sales. Torrington argues that Commerce's verification of NMB's response revealed that sales could be linked to shipments and, therefore, Commerce's acceptance of NMB's reporting methodology was not supported by the record. Torrington requests a remand requiring Commerce to resort to BIA. *Id.* at 44–46.

Commerce counters that it properly accepted NMB's reported air and ocean freight expenses once it recognized that in ESP transactions, there is often no direct link between specific shipments and individual sales. Commerce maintains that none of the documents cited by Torrington establishes a direct link between a specific shipment and an individual sale. Commerce concludes that because it determined NMB's methodology was reasonable and representative, resorting to BIA would not have been appropriate. Def.'s Partial Opp'n to Mots. J. Agency R. at 25–27. NMB essentially agrees with the arguments advanced by Commerce. NMB's Opp'n to Mot. J. Agency R. at 19–20.

The Court recently addressed this precise issue in reference to NMB/Pelmec Singapore in *Torrington*, Slip Op. 97–57, at 10–15. The Court upheld Commerce's acceptance of NMB's reporting of air and ocean freight expenses, finding that Commerce properly determined that it could not link specific sales to specific shipments. *Id.* at 13–14. The Court further held that Commerce satisfied its duty to investigate the methodology proposed by NMB to determine whether it was "reasonable and representative." *Id.* at 15 (quoting *Torrington Co. v. United States*, 17 CIT 967, 972, 832 F. Supp. 405, 410 (1993)). As the facts of this case are identical to those regarding NMB/Pelmec Singapore, the Court adheres to its prior decision and sustains Commerce on this issue.

7. *NMB's Research and Development Expenses:*

NMB contends that Commerce erred by including R&D expenses directly related to non-subject merchandise in its calculations of cost of production and constructed value. NMB emphasizes that, pursuant to

the antidumping statute and governing regulations, Commerce may only include in cost of production and constructed value manufacturing costs and general expenses relating to the class or kind of merchandise subject to the antidumping duty order. NMB maintains that because record evidence demonstrated that the R&D expenses incurred by Minebea Japan related directly to non-subject merchandise, Commerce's addition of these expenses to NMB/Pelmec Thailand's cost of production and constructed value was inconsistent with law. NMB's Mem. Supp. Mot. J. Agency R. at 12–17.

In the alternative, NMB requests a remand for Commerce to allocate the expenses over Minebea Japan's total consolidated cost of sales rather than over only a small portion of Minebea Japan's operations. *Id.* at 18–19.

Commerce responds that NMB failed to provide Commerce with relevant information about the distribution of R&D expenses to specific projects. Commerce further claims that NMB has failed to demonstrate to this Court that all of the R&D costs incurred by Minebea Japan were incurred with respect to non-subject merchandise. Def.'s Partial Opp'n to Mots. J. Agency R. at 38–40.

Commerce consents to a remand, however, to recalculate NMB/Pelmec's cost of production and constructed value after allocating Minebea Japan's R&D expenses over its total consolidated cost of sales, rather than over the subject merchandise. *Id.* at 40.

Torrington agrees with Commerce's conclusion that NMB failed to demonstrate that the R&D expenses were not related to the subject merchandise. Torrington objects to a remand, however, claiming that NMB failed to request a reallocation of the R&D expenses at the administrative level. Torrington's Opp'n to Mot. J. Agency R. at 5–14.

Again, NMB raises an issue recently addressed by this Court in *Torrington*, Slip Op. 97–57, at 15–18. The Court found that statements in Minebea Japan's annual report indicated that the R&D expenses may have been related to subject merchandise. *See 1992 Annual Report of Minebea Co., Ltd*, at 11, NMB's App., Ex. 2. The Court further held that NMB failed to demonstrate that Minebea Japan's R&D expenses were limited to non-subject merchandise. *Torrington*, Slip Op. 95–57, at 17. The Court did remand the case, however, for Commerce to recalculate NMB's cost of production and constructed value after allocating Minebea Japan's R&D expenses over its total consolidated cost of sales. *Id.* at 17–18. The facts involved in this case are indistinguishable from those in *Torrington*. Therefore, this case is remanded to Commerce to allocate Minebea Japan's R&D expenses over its total consolidated cost of sales.

8. *Packing Expenses:*

NMB contends that Commerce erred by adding NMB's packing expenses to FMV twice. NMB's Mem. Supp. Mot. J. Agency R. at 19–20. Commerce agrees that the final margin program for NMB/Pelmec Thai resulted in double-counting of packing expenses. Def.'s Partial Opp'n to Mot. J. Agency R. at 41. After a review of the record, the Court agrees a

remand is necessary to correct the clerical error resulting in the double-counting of packing expenses.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to: (1) recompute NMB's cost of production and constructed value after allocating Minebea Japan's R&D expenses over its total consolidated cost of sales; and (2) correct the clerical error resulting in the double-counting of NMB's packing expenses. Commerce is affirmed as to all other issues raised herein.

The remand results are due within ninety (90) days of the date that this opinion is entered. Any comments or responses by the parties to the remand results are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date the responses or comments are due.

(Slip Op. 97–82)

CRESCENT FOUNDRY CO. PVT. LTD., NANDIKESHWARI PVT. LTD., CARNATION ENTERPRISES PVT. LTD., KAJARIA IRON CASTINGS PVT. LTD., KEJRIWAL IRON & STEEL WORKS, OVERSEAS IRON FOUNDRY PVT. LTD., RAGHUNATH PRASAD PHOOLCHAND LTD., R.B. AGARWALLA & CO., RSI INDIA PVT. LTD., SERAMPORE INDUSTRIES PVT. LTD., SITARAM MADHOGARHIA & SONS PVT. LTD., SUPER CASTINGS (INDIA), TIRUPATI INTERNATIONAL (P) LTD., AND UMA IRON & STEEL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, DEFENDANT-INTERVENORS

Court No. 95–09–01239

[ITA remand results sustained in part. Remand order vacated in part. Final determination sustained.]

(Dated June 26, 1997)

Cameron & Hornbostel (Dennis James, Jr.) for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis)* and *Robert E. Nielsen*, Senior Counsel, Office of Chief Counsel for Import Administration, Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Robin H. Gilbert)* for defendant-intervenors.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* This case concerns the 1990 administrative review of a countervailing duty order regarding iron metal castings from

India. It was remanded: 1) to reconsider whether countervailing a tax deduction taken for countervailed Cash Compensatory Scheme (CCS) rebate payments double-counts the rebate subsidy, and 2) to recalculate the benefit received through § 80HHC of the Indian tax code after subtracting International Price Reimbursement Scheme (IPRS) payments for nonsubject merchandise from each company's taxable income. *Crescent Foundry v. United States*, 20 CIT ____, Slip Op. 96–200 (1996). On remand, Commerce concluded that when a company receives a grant such as a CCS or IPRS payment, and then receives a tax exemption for that grant, it has received two separately countervailable benefits. This finding is sustained, and the calculation of the § 80HHC subsidy contained in Commerce's original *Final Determination* is also sustained.

I.

Section 80HHC permits exporters to deduct profits derived from exports from their taxable income. *Certain Iron Metal Castings from India*, 60 Fed. Reg. 4,592, 4,594 (Dep't Comm. 1995) (prelim. admin. review) [hereinafter *Prelim. Determination]*. Commerce found that § 80HHC was a countervailable subsidy. *Id.* CCS payments, which rebate certain indirect taxes and import duties, contributed to the taxable income deducted under § 80HHC. *Certain Iron Metal Castings from India*, 60 Fed. Reg. 44,849, 44,854 (Dep't Comm. 1995) (final admin. review) [hereinafter *Final Determination]*. Commerce found that some CCS payments were also countervailable. Plaintiffs argued that Commerce should not have countervailed the amount of the § 80HHC deduction attributable to those CCS payments, and that by doing so Commerce was double-counting the CCS subsidy. The key to the double-counting issue is whether the CCS payments and § 80HHC deductions constitute one subsidy or two. If they are two separate subsidies, conferring independent benefits at different times, then there is no double-counting when each benefit is countervailed.

Plaintiffs' argument that the programs conferred a single benefit paralleled Commerce's reasoning in *Carbon Steel Wire Rod from Argentina*, 47 Fed. Reg. 42,393 (Dep't Comm. 1982) (suspension of investigation) and *Certain Welded Carbon Steel Pipe and Tube Products from Argentina*, 53 Fed. Reg. 37,619, 37,627 (Dep't Comm. 1988) (final aff. determination) [hereinafter *Argentine Cases]*, in which the Department declined to countervail an income tax exemption for an indirect tax rebate scheme similar to India's CCS program. At oral argument and in briefs subsequently filed with the court, neither party was able to demonstrate whether Commerce had considered and rejected the *Argentine Cases* in its investigation, or whether the cases continued to reflect current policy. As the record was unclear, the court remanded the issue to Commerce for further explanation.

The *Final Results* indicate that Commerce found the programs conferred two separate benefits. *(Final Results of Redetermination on Remand: Crescent Foundry v. United States, Slip Op. 96–200* (Feb. 24, 1997) [hereinafter *Final Results].)* The benefit of the CCS program is

the full amount of the countervailable payments received. *See Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures)*, Apr. 12, 1979, Annex items (h-i), 31 U.S.T. 513, 546–47 [hereinafter *Illustrative List]; see also* 19 U.S.C. §§ 2502(1), 2503(c)(5) (1988) (incorporating *Illustrative List* into United States domestic law). The benefit of § 80HHC is the difference between the income tax actually paid and the tax that would have been paid absent the § 80HHC deduction. *Final Results* at 5; *Prelim. Determination* at 4,594. This benefit is also a clearly countervailable subsidy. *Illustrative List* item (e) (Countervailable subsidies include "[t]he full or partial exemption * * * specifically related to exports, of direct taxes * * * paid or payable by industrial or commercial enterprises.") Commerce found that these two benefits were separate and unrelated, and concluded that there were two subsidies, each countervailable. *Final Results* at 5. Since the statute specifically requires Commerce to countervail both types of subsidies, Commerce's decision to countervail them separately is not a violation of that statute.

The question on remand was whether Commerce had previously decided as a matter of policy to treat such instances as if there were only one benefit. The *Argentine Cases* suggested that it had, concluding that "[s]ince we have separately determined the full benefit from this overrebate, we would be double-counting if we were to consider that a countervailable benefit is conferred by its exemption from the income tax." *Carbon Steel Wire Rod from Argentina*, 47 Fed. Reg. at 42,395. If Commerce did have such a policy, the department had an obligation to either follow that policy or to explain the reasons for its departure. *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988).

According to the *Final Results*, Commerce did not have such a policy. Commerce states that "*Argentine Wire Rod* must be considered an anomaly and not reflective of current Department policy or of Department policy in all of the case precedents[.]" *Final Results* at 4. It further explains that its usual procedure when exporters receive both a countervailable rebate and a tax exemption for that rebate is to calculate separate benefits and fully countervail both subsidies. *Id.* at 4–5. It appears that, on reflection, Commerce has determined that on this point the *Argentine Cases* were erroneously decided.

This conclusion is consistent with Commerce's treatment of countervailable tax exemptions in other determinations. There were investigations completed before the *Argentine Cases* in which Commerce countervailed both grant programs and tax exemptions without considering the effect of one upon the value of the other. *Lamb Meat from New Zealand*, 50 Fed. Reg. 37,708 (Dep't Comm. 1985) (final aff. determination) (tax benefit based on exporter status); *Fresh Atlantic Groundfish from Canada*, 51 Fed. Reg. 10,041 (Dep't Comm. 1986) (final aff. deter-

mination); *Oil Country Tubular Goods from Canada*, 51 Fed. Reg. 15,037 (Dep't Comm. 1986) (final aff. determination) (tax benefits based on regional location). Commerce has also continued that practice in determinations completed subsequent to *Crescent Foundry*. *See, e.g.*, *Certain Pasta from Turkey*, 61 Fed. Reg. 30,366 (Dep't Comm. 1996) (final aff. determination) (tax benefit based on exporter status); *see also Certain Pasta from Italy*, 61 Fed. Reg. 30,288 (Dep't Comm. 1996) (final aff. determination); *Fresh and Chilled Atlantic Salmon from Norway*, 56 Fed. Reg. 7,678 (Dep't Comm. 1991) (final aff. determination) (tax benefits based on regional location); *see also Certain Steel Products from Belgium*, 58 Fed. Reg. 37,273 (Dep't Comm. 1993) (final aff. determination); *Extruded Rubber Thread from Malaysia*, 57 Fed. Reg. 38,472 (Dep't Comm. 1992) (final aff. determination) (export-related tax deductions).

Commerce has broad discretion to interpret its own policies, within the limits of its statutory authority. *Hussey Copper*, 17 CIT at 997, 834 F. Supp. at 418; *Citrosuco Paulista*, 12 CIT at 1209, 704 F. Supp. at 1088. Its repudiation of the reasoning in the *Argentine Cases* is consistent with past practice in other determinations, and is not in violation of the relevant statutory language. It is therefore within that discretion, *see Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 806–09 (1973), and Commerce's decision not to subtract the amount of the § 80HHC deduction attributable to countervailed CCS payments from the § 80HHC subsidy is in accordance with law.

II.

IPRS payments contributed to the taxable income deducted under § 80HHC, just as the CCS payments did. When disputing the amount of the benefit conferred by § 80HHC, plaintiffs argued that Commerce should not have countervailed the amount of the § 80HHC deduction attributable to those IPRS payments.

The IPRS program reimbursed exporters for the difference in price between higher-priced domestic pig iron and its foreign equivalent. *Final Determination* at 44,854. Commerce found that none of the plaintiffs had received IPRS payments for subject merchandise. *Prelim. Determination* at 4,595. On remand, the court ordered Commerce not to countervail the portion of the § 80HHC deduction attributable to IPRS payments, because the IPRS payments had not benefitted subject merchandise. *Crescent Foundry*, Slip Op. 96–200 at 26.

The court reasoned that if the IPRS payments and the § 80HHC deduction are treated as a single benefit, and the IPRS payments are tied to nonsubject merchandise, then that single benefit is not countervailable. If they constitute two independent benefits, however, then the countervailability of one does not depend on the countervailability of the other. In light of Commerce's decision to treat a grant and a tax exemption for that grant as two separate benefits, the court has reconsidered its holding and determined that Commerce's original calculation of the § 80HHC subsidy was in accordance with law.

There are two types of export subsidies, "tied" and "untied." A tied export subsidy benefits particular merchandise. If that merchandise is subject to a countervailing duty order, then the tied subsidy is countervailable. Commerce determines the subsidy rate by dividing the benefit received by the total exports of the merchandise to which the subsidy is tied. *Final Results* at 11 (citing *Notice of Proposed Rulemaking and Request for Public Comments: Countervailing Duties*, 54 Fed. Reg. 23,366, 23,374–75 (1989)). An untied export subsidy benefits all of a firm's exports, both subject and nonsubject merchandise. Commerce calculates the subsidy rate for an untied subsidy by dividing the benefit by the total of all exports, not merely those subject to the countervailing duty order. *Id.* The rate is thus "diluted" to reflect the fact that some of the benefit applied to nonsubject merchandise.

Commerce concluded that the § 80HHC deduction is an untied subsidy because its benefit is "broad-based and not 'tied' to a specific product or market." *Id.* at 13. While taxable income can be divided according to whether it was derived from subject or nonsubject merchandise, the benefit of a tax exemption for that income, namely a more profitable bottom line after taxes, cannot be apportioned by product line. As § 80HHC is an untied subsidy, Commerce should countervail it according to the standard formula for untied subsidies outlined in the *Proposed Rules*. *Id.* This was the formula used in Commerce's original calculation. *Prelim. Determination* at 4,594.

Conclusion

Ordinarily, when the court rejects any portion of Commerce's remand results, it will order another remand and require Commerce to recalculate its findings again. Here, however, based on Commerce's clarification of its policy, the court is ordering Commerce to revert to calculations that it has already completed. There is nothing further for Commerce to research or decide, and there is no need for the parties to submit additional information or arguments to the agency. Therefore, in the interests of judicial economy and conservation of the parties' resources, the court will enter a final judgment immediately rather than order a remand that should serve as a mere formality.

To that end, the portion of *Crescent Foundry* ordering recalculation of the benefit received through § 80HHC is vacated. As Commerce's original calculation of the § 80HHC subsidy is sustained, it is not necessary for the court to sustain either of the recalculation approaches presented in the *Final Results*. The remainder of the *Final Results* is sustained.

Slip Op. 97–83

KAJARIA IRON CASTINGS PVT. LTD., CALCUTTA FERROUS LTD., CRESCENT FOUNDRY CO. PVT. LTD., COMMEX CORP., DINESH BROTHERS, NANDIKESHWARI PVT. LTD., CARNATION ENTERPRISES PVT. LTD., KEJRIWAL IRON & STEEL WORKS, R.B. AGARWALLA & CO., RSI LTD., SERAMPORE INDUSTRIES PVT. LTD., TIRUPATI INTERNATIONAL (P) LTD., AND UMA IRON & STEEL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND ALHAMBRA FOUNDRY, INC., ALLEGHENY FOUNDRY CO., DEETER FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., AND VULCAN FOUNDRY, INC., DEFENDANT-INTERVENORS

Court No. 95–09–01240

[ITA remand results sustained in part. Remand order vacated in part. Final determination sustained.]

(Dated June 26, 1997)

Cameron & Hornbostel (Dennis James, Jr.) for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Velta A. Melnbrencis* at oral argument; *Rhonda K. Schnare* on the brief) and *Robert E. Nielsen*, Senior Counsel, Office of Chief Counsel for Import Administration, Department of Commerce, of counsel, for defendant.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal and *Robin H. Gilbert)* for defendant-intervenors.

MEMORANDUM OPINION

DICARLO, *Senior Judge:* This case concerns the 1991 administrative review of a countervailing duty order regarding iron metal castings from India. It was remanded: 1) to reconsider whether countervailing a tax deduction taken for countervailed Cash Compensatory Scheme (CCS) rebate payments double-counts the rebate subsidy, and 2) to recalculate the benefit received through § 80HHC of the Indian tax code after subtracting International Price Reimbursement Scheme (IPRS) payments for nonsubject merchandise from each company's taxable income. *Kajaria Iron Castings v. United States*, 21 CIT ____, Slip Op. 97–10 (1997). Commerce's response was discussed in detail in *Crescent Foundry Co. Pvt. Ltd. v. United States*, 21 CIT ____, Slip Op. 97–82 (1997). On remand, Commerce concluded that when a company receives a grant such as a CCS or IPRS payment, and then receives a tax exemption for that grant, it has received two separate benefits which may both be countervailed without double-counting. For the reasons discussed in *Crescent Foundry*, this finding is sustained, and the calculation of the § 80HHC subsidy contained in Commerce's original *Final Determination* is also sustained.

CONCLUSION

The portion of *Kajaria Iron Castings* ordering recalculation of the benefit received through § 80HHC is vacated. As Commerce's original

calculation of the § 80HHC subsidy is therefore sustained, it is not necessary for the court to sustain either of the recalculation approaches presented in the *Final Results*. The remainder of the *Final Results* is sustained.

(Slip Op. 97–84)

KEMET ELECTRONICS CORP., ET AL., PLAINTIFFS *v.* CHARLENE BARSHEFSKY, UNITED STATES TRADE REPRESENTATIVE, AND GEORGE WEISE, COMMISSIONER OF CUSTOMS, DEFENDANTS

Court No. 97–06–00930

[Plaintiff's motion for a temporary restraining order is denied.]

(Dated June 27, 1997)

Porter, Wright, Morris & Arthur (Richard M. Markus, David C. Tryon, Leslie A. Glick and *Bart Fisher)* for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jeffrey M. Telep)* and *Hal Shapiro*, Office of the United States Trade Representative, for defendants.

OPINION

RESTANI, *Judge:* Plaintiffs Kemet Electronics Corp. *et al.*, (collectively, the "Passive Electronics Coalition") seek a temporary restraining order against defendants United States Trade Representative Charlene Barshefsky ("USTR") and Commissioner of Customs George Weise to enjoin the reduction and elimination of tariffs on electronic capacitors and resistors, which defendants propose to implement on July 1, 1997 following a Presidential Proclamation, as part of the Information Technology Agreement negotiated by the USTR.

BACKGROUND

Plaintiffs own and operate manufacturing facilities in the United States for the production and sale of electronic capacitors and resistors. Foreign producers of comparable products (notably Japan) actively compete with plaintiffs for the sale of those products in the United States. At the first Ministerial Conference of the World Trade Organization in December 1996, the USTR negotiated and agreed to the *Ministerial Declaration on Trade in Information Technology Products* (commonly referred to as the "Information and Technology Agreement"), which commits the United States to reduce and eventually eliminate tariffs on certain information and technology products. *Ministerial Declaration on Trade in Information Technology Products*, Dec. 13, 1996, 36 I.L.M. 375, 383 [hereinafter "ITA"].

Currently, there is a 9.4% *ad valorem* tariff on the importation of capacitors under Item No. 8532 of the Harmonized Tariff Schedules of the

United States. USITC Pub. 3001, sec. XVI, ch. 85, at 85–49 [hereinafter "HTSUS"]. HTSUS Item No. 8533 presently imposes a 6% *ad valorem* tariff on the importation of resistors. *Id.* at 85–50. The USTR announced on December 13, 1996 that the United States would reduce these tariffs by 25% each year starting in July 1997 and would completely eliminate such tariffs by January 1, 2000.[1] Plaintiffs seek to enjoin the proposed 25% reduction in the current tariffs on capacitors and resistors.

DISCUSSION

In determining whether to grant a temporary restraining order, the court must balance four factors: 1) the threat of immediate, irreparable harm to plaintiffs; 2) the likelihood of success on the merits; 3) whether the public interest would be better served by issuance of a temporary restraining order; and 4) whether the balance of hardships favors the plaintiff. *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983).

I. The Threat of Immediate, Irreparable Harm

Plaintiffs claim that the 25% reduction in the current tariffs on capacitors and resistors will dramatically harm U.S. manufacturers when foreign manufactures export their products to the United States without paying the current duties. Plaintiffs assert that capacitors and resistors are generally produced in very high volumes in order to reduce the price as much as possible as competition for sales is based primarily on price, and related profit margins are very small. As a result, plaintiffs state that many producers have become highly specialized and produce only a limited number of types for capacitors or resistors. *See Advice Concerning the Proposed Modification of Duties on Certain Information Technology Products and Distilled Spirits*, Investigation No. 332–380, USITC Pub. No. 3031 (April 1997) [hereinafter "ITC Report"]; Pls.' Ex. F.

Plaintiffs assert that domestic producers have high labor costs relative to many foreign producers of electronic components and face a relative disadvantage in production costs compared to their foreign counterparts. Plaintiffs claim that the U.S. capacitor and resistor manufacturing industry is attempting to compensate for its increased labor costs with automation and production sharing, but it cannot completely offset higher labor costs.

Absent an injunction before the first phase of the ITA elimination of tariffs on capacitors and resistors on July 1, 1997, plaintiffs claim that defendants will immediately reduce duties on foreign capacitors and resistors by 25%. As the ITA requires this action, the court does not doubt that this is so. As sales of these products are extremely price sensitive,

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[1] The Information Technology Agreement provides in relevant part that,

> Unless otherwise agreed by the participants, each participant shall bind all tariffs on items listed in the Attachments no later than 1 July 1997, and shall make the first such rate reduction effective no later than 1 July 1997, the second such rate reduction no later than 1 January 1998, and the third such rate reduction no later than 1 January 1999, and the elimination of customs duties shall be completed effective no later than 1 January 2000.

ITA, Annex ¶ 2(a)(i), at 3.

plaintiffs assert that such a reduction in duties will have disastrous consequences for plaintiffs, but admit that they cannot determine the precise impact on their sales and profits. Plaintiffs claim that this difficulty in quantifying damages from lost business further supports injunctive relief here.

Plaintiffs also contend that the tariff reductions will likely force smaller domestic manufacturers out of business and larger domestic manufacturers to lose sales and profits if they are able to survive. In addition, some manufacturers may be forced to move manufacturing jobs offshore to remain competitive. As specific examples, plaintiffs have provided affidavits stating the following:

> a. Kemet Electronics Corp. estimates that the results of the tariff reductions for the fiscal year 1997 would be a $13,000,000 loss in revenue and pre-tax profit and a $8,900,000 loss (a 23% reduction) in net income. *See* Poinsette Aff. ¶ 16, at 5 & Ex. 1, at 2; Pls.' Ex. C.
>
> b. Barker Microfarads, Inc., a producer of aluminum capacitors estimates that in the first year after the initial tariff reduction it will lose approximately $1,171,000 in annual sales (approx. 10% of present sales) with the related loss of 25 (out of 250) jobs. *See* Poole Aff. ¶ 7(a) at 2; Pls.' Ex. A.
>
> c. Cornell Dublier Electronics estimates that the phase-out of the tariffs will cause a $570,000 loss in 1998 sales and profit losses of $86,000. *See* Kaplan Aff. ¶ 7, at 2; Pls.' Ex. B.

Plaintiffs claim that all of the plaintiffs will suffer damage similar to these examples as a result of the proposed tariff reductions.

Furthermore, plaintiffs contend that the proposed tariff reductions will greatly exacerbate inroads that foreign capacitor and resistor manufacturers have made in the U.S. market in recent years. Plaintiffs claim that the number of U.S. owned and operated manufacturers for these products have been shrinking steadily and the proposed tariff elimination will provide further advantage for foreign manufacturers who seek to control the U.S. market. Plaintiffs argue that they have faced a continuing erosion of their market share in favor of Japanese manufacturers who they claim garner U.S. market share by charging less than market prices here while their government permits Japanese markets to be closed to foreign competition, preventing plaintiffs from selling there.

Plaintiffs further assert that once jobs and related skills are lost in the United States, regaining them in the future will be extremely difficult. Plaintiffs argue that the jobs that move overseas are inevitably accompanied by the technology for manufacturing these products and within a few years after those countries gain these jobs, they will develop the necessary engineering and training skills to fully support the manufacture of capacitors and resistors. Even if the United States were later able to become sufficiently price competitive to bring the manufacturing jobs back, plaintiffs claim that manufacturers would have to start from scratch in rebuilding the industry. Plaintiffs maintain that these losses will be permanent and irreparable.

Moreover, plaintiffs argue that if the tariff reductions go forward, but are ultimately held invalid, they will have no recourse against anyone for their lost sales and profits. They also assert that any workers who have lost their jobs as a result of lost sales will likewise have no recourse. Plaintiffs contend that irreparable harm from lost business supports immediate injunctive relief. *See, e.g., Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995). The ITC Report supports plaintiffs' allegations as to the price sensitive nature of this industry. Defendants have had little opportunity to respond to these allegations, but the court accepts for purposes of this motion that plaintiffs' allegations of harm are true. They do not, however, establish clearly that irreparable harm will occur in advance of the decision on plaintiff's preliminary injunction motion, hearing on which will occur July 10, 1997.

II. Likelihood of Success on the Merits

A. *Delegation of Legislative Powers:*

Plaintiffs are unlikely to prevail on their argument that because Congress imposed no time limit in the Uruguay Round Agreements Act ("URAA") on Presidential tariff-reducing authority and because the other limitations on such authority are so expansive, that an unconstitutional delegation of law-making power has occurred. The court notes that while Congress' authority to engage in such delegation may not be unlimited, because the delegated authority is intertwined with the President's independent authority to conduct foreign relations, broad delegation is permitted. *See Loving v. United States*, 116 S. Ct. 1737, 1750 (1996) (when delegated duty is interlinked with duties already assigned to President by Constitution, the same limitations on legislative delegation do not apply as when power is granted solely by delegation); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936).

Plaintiffs are also unlikely to prevail on the basis that, Congress has failed to provide an "intelligible principle" by which the President or his representative is to be guided. *See also Loving*, 116 S. Ct. at 1750 ("Though in 1935 we struck down two delegations for lack of an intelligible principle, we have since upheld without exception, delegations under standards phrased in sweeping terms.") (citations omitted). As will be explained, *see infra* sections II. B & C, principles are set forth. They allow a great deal of discretion but the court does not find the principles to be unintelligible.

B. *Consultation and Layover Requirement:*

Plaintiffs argue that the proposed tariff reductions and elimination were negotiated and carried out without the statutorily required consultation with industry representatives. Before the USTR negotiates for tariff reductions and before actually reducing or eliminating tariffs, plaintiffs claim that the USTR must first engage in direct, effective, and meaningful consultations with members of the affected industry. Plain-

tiffs argue that this was not done and had it been done, the President and his representatives would have learned of the severe impact which the intended tariff reductions will have on the domestic capacitor and resistor industry and the individual members of the industry. Because the USTR did not follow the required statutory procedure, plaintiffs argue that the resulting tariff decisions are unlawful.

The Trade Act of 1974, section 135 (codified as 19 U.S.C. § 2155), requires the President's trade negotiation representatives to seek information and advice from the private sector. Section 2155 provides that "[t]he President shall seek information and advice from representative elements of the private sector and the non-Federal governmental sector with respect to—(A) negotiating objectives and bargaining positions before entering into a trade agreement under section 2902 of this title." 19 U.S.C. § 2155(a)(1)(A) (1994). Plaintiffs assert that no capacitor or resistor manufacturer was a member of the Industry Sector Advisory Committee Electronics and Instrumentation ("ISAC–5") that advised the USTR. *See* Poinsette Aff. dated Jun. 19, 1997, ¶ 6, at 2. Plaintiffs also claim that the USTR misled plaintiffs and others by assuring representatives of the capacitor industry that capacitors would not be included in the ITA. Poinsette Aff. dated Jun. 19, 1997, ¶ 14; Pls.' Ex. G. Plaintiffs argue that these actions violate the Trade Act of 1974.

Although there is no absolute timing requirement with regard to when the President shall seek advice, the statute provides that, "[t]o the maximum extent feasible, such information and advice on negotiating objectives shall be sought and considered before the commencement of negotiations." 19 U.S.C. § 2155(a). Plaintiffs claim that the legislative history shows a very strong congressional intent in having a private sector advisory committee consultation *before and during* any major trade negotiations. The report of the Senate Finance Committee on the Trade Reform Act of 1974 states that,

> The requirement that the President also establish advisory committees for particular product sectors to be representative, so far as practicable, of all industry, labor, or agricultural interests in such sector reflects the Committee's concern that in past trade negotiations there has not been adequate input from U.S. producers who are in the best position to assess the effects of removing U.S. and foreign trade barriers on their particular products.

S. Rep. No. 1298, 93d Cong., 2d Sess. 101 (1974). The report also states that the purpose of the provision is to give "representative elements from the private sector" an opportunity to "make known their views to U.S. negotiators * * * before and during the multilateral trade negotiations." *Id.*

The URAA provides that "subject to the consultation and layover requirements of section 3524 of this title, the President may proclaim—(1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX * * *." 19 U.S.C. § 3521(b)(1) (1994). Schedule XX includes the tariffs and duties on resistors and capacitors. The "con-

sultation and layover requirements" are set forth in 19 U.S.C. § 3524. Section 3524 requires the President, *inter alia*, to obtain "advice regarding the proposed action from—(A) the appropriate advisory committees established under section 2155 of this title, and (B) the International Trade Commission." 19 U.S.C. § 3524(1) (1994). The statute requires the President to consult with such entities regarding the proposed action and then to submit a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate setting forth the action proposed to be proclaimed with the reason for such the action and the advice obtained. *Id.* § 3524(2). After submitting such a report to Congress, a 60 calendar day layover period ensues, during which the President must consult with the appropriate advisory committees regarding the proposed action. *Id.* § 3524(3) & (4).

While the "appropriate advisory committee" is not specified further by statute, plaintiffs claim that the appropriate advisory committee would be only one that included capacitor and resistor producers. In the present case, plaintiffs claim that the USTR met only with a "promotional group," the Information Technology Agreement Coalition, which included foreign and foreign-controlled companies who would benefit from the tariff reductions, but did not include plaintiffs and which did not represent the plaintiffs' interests. *See* Plaintiffs' Statement Before the U.S. House of Representatives Committee on Ways & Means Subcommittee on Trade; Pls.' Ex. E at 4.

Defendants, however, assert that the President is only required to consult with the advisory committee which in the President's discretion is appropriate. Defendants claim that the President properly received advice from ISAC–5, an advisory committee created pursuant to 19 U.S.C. § 2155(c). Defendants assert that plaintiffs were represented in the ISAC–5 by the Electronics Industries Association. Although plaintiffs admit that the USTR did consult with ISAC–5, plaintiffs claim that capacitor and resistor manufacturers make up collectively 65 of the 1300 member companies and point out that ISAC–5 did not provide a report to the USTR until April 20, 1997, which was four months after the USTR had agreed to remove tariffs on capacitors and resistors. *See* ITC Report; Pls.' Ex. F. The court notes, however, that there is no statutory requirement that a representative from any specific industry be included in any of the advisory committees provided for in 19 U.S.C. § 2155 or that a formal report be submitted by the selected advisory committee before negotiations are concluded.

Plaintiffs also claim that the United States International Trade Commission ("ITC") conducted no hearings and reached its conclusion with regard to the proposed ITA before the end of the announced time for comment and without meaningful opportunity for public participation. After the tariff negotiations had been completed, plaintiffs assert that the USTR belatedly asked the ITC for its advice and input and set a deadline for the ITC report prior to the last day allowed for public comment to the ITC. Plaintiffs contend that this sequence denied the public

an adequate opportunity to guide or assist the USTR in the trade negotiations, or to protect the affected industries, companies, and employees.

In testimony to Congress, plaintiffs stated that the USTR, informally asked the ITC in November 1996 to seek the views of domestic capacitor producers and some calls were made in what plaintiffs claim was a very informal and unscientific manner. *See* Pls.' Ex. E at 4. Plaintiffs further stated that the USTR had asked the ITC to do more of an investigation, but plaintiffs "have received reports that this is not in good faith and is only a gesture to go through the motions." *Id.*

It appears that the USTR has complied with the statutory consultation requirements. While consultation may have been minimal from plaintiffs' perspective, it did occur. Plaintiffs have not demonstrated that they are likely to establish that the consultation was illusory. Consequently, plaintiffs appear unlikely to succeed on their claim that statutory consultation and layover requirements were not met.

C. *Authority for Tariff Reductions Provided by the URAA:*

Section 111(b) of the URAA (codified as 19 U.S.C. § 3521(b)) authorizes the President to modify duties on articles in tariff categories that were the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations.[2] Plaintiffs characterize this authority as merely an extension of the negotiating and proclamation authority the President previously enjoyed under 19 U.S.C. § 2902, which has since expired. Plaintiffs claim that capacitors and resistors, however, were not contained within the list of zero-for-zero tariff elimination initiatives proposed by the USTR during these negotiations. Moreover, plaintiffs argue that no tariff elimination negotiations on capacitors and resistors could have taken place or been seriously proposed in the Uruguay Round, as the President possessed the legal authority to eliminate tariffs only on products bearing a tariff of 5% *ad valorem* or below on August 23, 1988. *See* 19 U.S.C. § 2902(a)(2)(A). Plaintiffs maintain that the tariffs on capacitors and resistors were above that level and this fact distinguishes capacitors and resistors from practically all other products in the ITA, which they claim are at much lower, "nuisance" tariff levels.[3] Accordingly, plaintiffs conclude that the USTR acted beyond its statutory authority in negotiating the tariff elimination for capacitors and resistors.

The court does not agree. Congress delegated to the President broad trade agreement negotiating authority pursuant to 19 U.S.C. § 2902(a)(2). Congress, however, originally limited the President's authority to implement through proclamation negotiated trade agree-

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[2] Section 111(b) also requires that any such modification be agreed to in a "multilateral negotiation under the auspices of the WTO." 19 U.S.C. § 3521(b)(1)(A). Fulfillment of this requirement is not disputed.

[3] The tariffs are admittedly more than 5% but also are less than 10%.

ments as specified in section 2902(a)(2) through (5).[4] 19 U.S.C. § 2902(a)(1)(B). The President's negotiating and proclamation authority pursuant to section 2902(a) expired on June 1, 1993. Thereafter, Congress extended and enlarged the President's proclamation authority pursuant to 19 U.S.C. § 3521. Section 3521 provides that

> *In addition* to the authority provided by section 2902 of this title, the President shall have the authority to proclaim—
>
> (1) such other modifications of any duty,
> (2) such other staged rate reduction, or
> (3) such additional duties,
>
> as the President determines to be necessary or appropriate to carry out Schedule XX.

19 U.S.C. § 3521(a) (emphasis added). Section 3521(b) provides,

> Subject to the consultation and layover requirements of section 3524 of this title, the President may proclaim—
>
> (1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX if—
>
> (A) the United States agrees to such modification or staged rate reduction in a multilateral negotiation under the auspices of the WTO, and
>
> (B) such modification or staged rate reduction applies to the rate of duty on an article contained in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations, and
>
> (2) such modifications as are necessary to correct technical errors in Schedule XX or to make other rectifications to the Schedule.

Id. § 3521(b).

Defendants have presented documents to the court, including the March 15, 1990 *U.S. Proposal for Uruguay Market Access Negotiations*[5] and correspondence from a foreign government, which support the conclusion that the "tariff category" at issue "was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations." *See* 19 U.S.C. § 1321(b)(1)(B). Accordingly, the court concludes that plaintiff is unlikely to establish that the USTR has not acted within the President's authority to proclaim the proposed tariff reductions on capacitors and resistors.

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[4] Section 2902(a)(2), Title 19 of the United States Code provides in relevant part:

> No proclamation may be made under subsection (a) of this section that—
>
> (A) reduces any rate of duty (other than a rate of duty that does not exceed 5 percent ad valorem on August 23, 1988,) to a rate which is less than 50 percent of the rate of such duty that applies on such date; or
> (B) increases any rate of duty above the rate that applies on such date of enactment.

19 U.S.C. § 2902(a)(2).

[5] The U.S. Proposal also makes clear that during the Uruguay Round the USTR intended to explore "duty-free sectoral approaches as part of the overall market access negotiations," even where proclamation authority was lacking. *See U.S. Proposal for Uruguay Market Access Negotiations*; Defs.' Ex. B at 4. This included parts of the electronics sector. *Id.* at 5. Chapter 85 of the Harmonized Tariff System, which included the tariff categories at issue is listed as available for negotiation on reciprocal duty eliminations. *Id.*

III. The Public Interest

Plaintiffs argue that it is in the public interest to grant them injunctive relief as thousands of jobs, together with the manufacturing technology required for these jobs, will be lost in the United States as a result of the implementation of the proposed tariff reductions. Plaintiffs also claim that because many of the current military defense systems use the resistors and capacitors manufactured by plaintiffs, our national security interest will be harmed by any loss of the United States' ability to manufacture its defense systems domestically rather than relying on foreign suppliers.

Defendants counter that any injunctive relief granted to plaintiffs will threaten to undermine the viability of the ITA as a whole. *See* Lang Aff. Defendants claim that the ITA was negotiated on a multilateral basis between 42 participating World Trade Organization members with an exchange of obligations to eliminate tariffs on every product contained in the list of covered items, worth approximately $500 billion in 1995 global trade. *Id.* ¶ 3, at 1–2. Defendants maintain that the ITA was negotiated and drafted as an "all or nothing" agreement and any delay in its implementation by the July 1, 1997 deadline could put at risk the commitment of the 41 other participants to implement their tariff obligations on all ITA products. *Id.* ¶ 6, at 2. Defendants assert that any modification of the implementation date would create uncertainty for exporters and importers and would diminish the benefits of the agreement to U.S. producers and their employees in the United States. *Id.* ¶ 5, at 2.

Despite plaintiffs' assertions, the court concludes that given the important foreign relations concerns of the United States and the potential harm to the ITA as a whole, the public interest favors denying plaintiff's motion for a temporary restraining order.

IV. Balance of Hardships

Although plaintiffs have made a minimal showing of irreparable harm in the long term, they do not make a showing of substantial harm in the short period between now and the likely date of court action on plaintiffs' preliminary injunction motion. Moreover, defendants' evidence of the potential harm to the ITA as a whole and the United States' negotiating position internationally favors denial of plaintiffs' motion for a temporary restraining order prior to the court's hearing on plaintiffs' motion for a preliminary injunction in this matter.

Conclusion

Although plaintiffs have made a minimal showing of a threat of immediate and irreparable harm, plaintiffs have not established that they are likely to succeed on the merits of their claim, and the public interest and a balancing of hardships do not favor injunctive relief. Accordingly, the court denies plaintiffs' motion for a temporary restraining order.

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